No. 99-1978-CFX Title: United States, Petitioner
v.
Terry J. Hatter, Jr., Judge, United States District Court for the Central District of California, et al.

Docketed:
June 9, 2000 Court: United States Court of Appeals for the Federal Circuit

Entry	Date	Proceedings and Orders
	Apr 28 2000	Application (99A888) to extend the time to file a petition for a writ of certiorari from May 9, 2000 to June 8, 2000, submitted to The Chief Justice.
	May 2 2000	Application (99A888) granted by the Chief Justice extending the time to file until June 8, 2000.
	Jun 8 2000	Petition for writ of certiorari filed. (Response due August 9, 2000)
	Jun 8 2000	Appendix of petitioner filed.
	Jun 26 2000	Order extending time to file response to petition until August 9, 2000.
	Aug 9 2000	Brief of respondents Terry Hatter, et al. in opposition filed.
	Aug 23 2000	DISTRIBUTED for Conference of September 25, 2000
	Aug 24 2000	Reply brief of petitioner United States filed.
	Oct 2 2000	REDISTRIBUTED for Conference of October 6, 2000
	Oct 10 2000	REDISTRIBUTED for Conference of October 13, 2000
	Oct 16 2000	Petition GRANTED. Justice Stevens and Justice O'Connor OUT. SET FOR ARGUMENT February 20, 2001. **********
	Nov 30 2000	Brief of petitioner United States filed.
	Nov 30 2000	Joint appendix filed.
	Dec 7 2000	Order extending time to file respondents' brief on the merits to and including January 5, 2001.
	Dec 22 2000	Record filed.
	Jan 3 2001	Letter and attachment received from the Solicitor General
	Jan 5 2001	Brief amici curiae of Los Angeles County Bar Association, et al. filed.
	Jan 5 2001	Brief amicus curiae of Federal Judges Association filed.
	Jan 5 2001	Brief of respondents Terry Hatter, et al. filed.
	Jan 18 2001	CIRCULATED.
	Feb 12 2001	Reply brief of petitioner United States filed.
	Feb 16 2001	Letter and attached Federal Circuit decision received from the Solicitor General and distributed.
	Feb 20 2001	ARGUED.

Supreme Court, U.S.
FILED
99 1978 JUN 8 - 2000
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

DAVID M. COHEN
DOUGLAS N. LETTER
JEANNE E. DAVIDSON
KATHLEEN MORIARTY MUELLER
ANNE MURPHY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

36 pp

QUESTIONS PRESENTED

This case concerns Congress's actions to bring federal judges within the Medicare hospital insurance (HI) program and Social Security old-age, survivors, and disability insurance (OASDI) program by extending coverage under those programs, as well as the taxes financing those programs, to the employment of Article III judges. The questions presented are:

1. Whether Congress violated the Compensation Clause, U.S. Const. Art. III, § 1, when it extended the taxes financing the HI and OASDI programs to the judicial salaries of respondents, who were sitting Article III judges at the time those taxes were first applied to judicial salaries.

2. Whether any constitutional violation ended when Congress increased the statutory salaries of federal judges in an amount greater than the amount of HI and OASDI taxes deducted from respondents' judicial salaries.

PARTIES TO THE PROCEEDINGS

Petitioner United States was the defendant in the Court of Federal Claims and the appellee in the court of appeals.

Respondents, who were plaintiffs in the Court of Federal Claims and appellants in the court of appeals, are Judges Terry J. Hatter, Jr., Peter H. Beer, Dudley H. Bowen, Jr., A.J. McNamara, Harry Pregerson, Raul A. Ramirez, Norman C. Roettger, Jr., Thomas A. Wiseman, Jr., Terence T. Evans, Henry A. Mentz, Jr., Wilbur D. Owens, Jr., Henry R. Wilholt, Jr., Harold A. Baker, and Michael M. Mihm, as well as Dolores Lee Burciaga as executrix of the estate of the late Judge Juan G. Burciaga, and Mary Martin Arceneaux on behalf of the late George Arceneaux, Jr.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	2
Reasons for granting the petition	13
Conclusion	30

TABLE OF AUTHORITIES

Cases:

Agostini v. *Felton*, 521 U.S. 203 (1997)	20
Arizona v. *California*, 460 U.S. 605 (1983)	20
Christianson v. *Colt Indus. Operating Corp.*, 486 U.S. 800 (1988)	20
Collector v. *Day*, 78 U.S. (11 Wall.) 113 (1871)	21, 25
Durant v. *Essex Co.*, 74 U.S. (7 Wall.) 107 (1868)	19
Evans v. *Gore*, 253 U.S. 245 (1920)	8, 14, 17, 18, 21, 22, 23, 25
Friedman v. *United States*, 159 Ct. Cl. 1 (1962)	12
Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939)	25
Jefferson County v. *Acker*:	
527 U.S. 423 (1999)	25
210 F.3d 1317 (11th Cir. 2000)	15, 23, 24
Messenger v. *Anderson*, 225 U.S. 436 (1912)	20
Miles v. *Graham*, 268 U.S. 501 (1925)	17, 22, 23
Neil v. *Biggers*, 409 U.S. 188 (1972)	19
O'Malley v. *Woodrough*, 307 U.S. 277 (1939)	8, 17, 22, 23, 26, 29
Pollock v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)	21, 25
Quern v. *Jordan*, 440 U.S. 332 (1979)	20
Rodriquez de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477 (1989)	8

Cases—Continued: Page

South Carolina v. *Baker*, 485 U.S. 505 (1988) 25
United States v. *Pink*, 315 U.S. 203 (1942) 20
United States v. *Will*, 449 U.S. 200 (1980) 8, 17, 18, 23, 24, 25, 26, 27

Constitution and statutes:

U.S. Const.:
Art. III, § 1 (Compensation Clause) ..... *passim*
Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 4
§ 101(b)(1), 97 Stat. 70 4
§ 101(b)(2), 97 Stat. 70 4
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Tit. II, Subtit. E, Pt. III, § 278, 96 Stat. 559-563 4
Tucker Act, 28 U.S.C. 1491(a)(1) 7
5 U.S.C. 8331 *et seq.* 3
5 U.S.C. 8334(a)(1) (1994 & Supp. IV 1998) 26
26 U.S.C. 3101 (1994 & Supp. IV 1998) 2, 4
26 U.S.C. 3101(a) (1994 & Supp. IV 1998) 3
26 U.S.C. 3101(b) (1994 & Supp. IV 1998) 3
26 U.S.C. 3121 ..... 2, 4
26 U.S.C. 3121(b) 3, 4
26 U.S.C. 3121(b)(5) (1994 & Supp. IV 1998) 4, 5
26 U.S.C. 3121(b)(6)(A) (1976) 4
26 U.S.C. 3121(u) 3, 4
26 U.S.C. 3121(u)(1)(A) (1982) 4
26 U.S.C. 6103 18
26 U.S.C. 6311(a) 19
26 U.S.C. 6313(c) 19
28 U.S.C. 1 ..... 8, 16
28 U.S.C. 44 7
28 U.S.C. 135 7
28 U.S.C. 371 4
28 U.S.C. 371(a) 3, 26
28 U.S.C. 455(b)(4) 16, 17, 19

Statutes—Continued: Page

28 U.S.C. 2109 ..... 8, 16, 19
28 U.S.C. 2401(a) 9, 15, 16
28 U.S.C. 2501 9
42 U.S.C. 402(a) 3
42 U.S.C. 409(a) (Supp. IV 1998) 3
42 U.S.C. 413(a)(2)(A) 3
42 U.S.C. 414(a)(2) 3
42 U.S.C. 426(a)(2)(A) 3

Miscellaneous:

Exec. Order No. 12,387, 47 Fed. Reg. 44,981 (1982) 6
Exec. Order No. 12,456, 49 Fed. Reg. 347 (1983) 7
Exec. Order No. 12,477, 49 Fed. Reg. 22,041 (1984) 7
Exec. Order No. 12,487, 49 Fed. Reg. 36,493 (1984) 7
Exec. Order No. 13,144, 64 Fed. Reg. 72,242 (1999) 7
H.R. Rep. No. 25, 98th Cong., 1st Sess. (1983) 6
Vol. I, S. Rep. No. 494, 97th Cong., 2d Sess. (1982) 5
The Oxford Companion to the Supreme Court (Kermit L. Hall ed., 1992) 17

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The initial decision of the United States Claims Court (predecessor to the Court of Federal Claims), dismissing this case for lack of jurisdiction (App. 12a-18a),[1] is reported at 21 Cl. Ct. 786. The decision of the court of appeals reversing that dismissal (App. 19a-29a) is reported at 953 F.2d 626. The decision of the Court of Federal Claims on remand, dismissing respondents' constitutional claims on the merits (App. 30a-53a), is reported at 31 Fed. Cl. 436. The decision of the court of appeals reversing that dismissal and ruling in favor of respondents on the merits (App. 54a-66a) is reported at 64 F.3d 647. The decision of this Court, affirming the decision of the court of appeals under 28 U.S.C. 2109 because

[1] "App." refers to the separately bound appendix to this petition.

of the lack of a quorum (App. 69a), is reported at 519 U.S. 801.

The further decision of the Court of Federal Claims on remand, ruling in favor of the United States on the issues of damages and the statute of limitations but awarding some respondents limited relief (App. 70a-111a), is reported at 38 Fed. Cl. 166. The opinion of the panel of the court of appeals reversing the Court of Federal Claims insofar as it ruled in favor of the United States on damages (App. 112a-127a) is reported at 185 F.3d 1356. The order of the court of appeals vacating the panel's judgment and ordering rehearing en banc on the issue of the statute of limitations (App. 128a-129a) is reported at 199 F.3d 1316. The opinion of the en banc court of appeals, reversing the Court of Federal Claims on both damages and the statute of limitations (App. 1a-11a), is reported at 203 F.3d 795.

JURISDICTION

The judgment of the en banc court of appeals was entered on February 9, 2000. On May 2, 2000, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Reprinted in an appendix to this petition (App. 130a-132a) are the Compensation Clause, U.S. Const. Art. III, § 1, and pertinent provisions of 26 U.S.C. 3101 and 3121.

STATEMENT

1. More than 90% of the paid civilian labor force is engaged in employment covered by the Social Security old-age, survivors, and disability insurance (OASDI) program and the Medicare hospital insurance (HI) program. Employees earn credits based on their employment towards eligibility for OASDI and HI benefits and pay taxes on their wages

or salaries to finance those programs.[2] Before 1983, however, the employment of Article III judges, as well as almost all other federal employees, was excluded from the HI and OASDI programs. Instead, most employees of the Legislative and Executive Branches were required to contribute to the Civil Service Retirement System (CSRS) to obtain a retirement immunity. See 5 U.S.C. 8331 *et seq.* Article III judges were (and are) entitled to retire after meeting certain age and service requirements, and to receive lifetime annuities equal to their salary at the time of retirement. See 28 U.S.C. 371(a). Article III judges (like other federal employees) could qualify for OASDI and HI benefits on the basis of their prior employment outside the federal system, but they could not receive credits for either program based on their federal employment, nor were they subject to OASDI or HI taxes on their federal judicial salaries.

On January 1, 1983, employees in all three Branches of government first began to earn credits for Medicare HI coverage on the basis of their federal employment, and also first became subject to the HI tax on their salaries. One year later, on January 1, 1984, federal employees began to earn credits for Social Security old-age benefits on the basis of their federal service, and also became subject to the OASDI tax on their salaries.[3] The 1983 and 1984 amend-

---

[2] Eligibility for HI benefits, in general, is tied to eligibility for Social Security old-age benefits. See 42 U.S.C. 426(a)(2)(A). Eligibility for old-age benefits is based on an individual's having paid OASDI taxes for 40 "quarters of coverage." See 42 U.S.C. 402(a), 414(a)(2). "Quarters of coverage" is tied to payment of "wages," which is defined in terms of remuneration for "employment." See 42 U.S.C. 409(a) (Supp. IV 1998), 413(a)(2)(A).

[3] The taxes on employees' wages that finance in part the OASDI and HI programs are imposed by 26 U.S.C. 3101(a) and (b) (1994 & Supp. IV 1998). Both Sections impose a tax on wages with respect to "employment," as defined in 26 U.S.C. 3121(b). Section 3121(b) and a companion provision, Section 3121(u), have undergone several changes

ments also imposed HI and OASDI taxes for the first time on the salaries of the President, Vice President, cabinet members, political appointees in the Senior Executive Service, Members of Congress, and all new Executive and Legislative Branch employees, as well as any then-current

---

relevant to this case. Before September 3, 1982, Section 3121(b) excluded from the definition of "employment" "service performed in the employ of the United States * * * if such service is covered by a retirement system established by a law of the United States." 26 U.S.C. 3121(b)(6)(A) (1976). That provision exempted Article III judges from the HI and OASDI taxes, because those judges were (and are) covered by another retirement system established by 28 U.S.C. 371, which permits judges to retire from active service on annuity or full salary.

Congress extended the HI tax to federal judges' salaries in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, Tit. II, Subtit. E, Pt. III, § 278, 96 Stat. 559-563. TEFRA added a new Section 3121(u)(1)(A), which provided that, "[f]or purposes of the [Medicare hospital insurance tax] imposed by section 3101(b) * * * paragraph (6) of [26 U.S.C. 3121(b)] shall be applied without regard to subparagraph[] (A) * * * thereof." 26 U.S.C. 3121(u)(1)(A) (1982); see 96 Stat. 559. TEFRA, in effect, instructed that the exclusion of federal judges' salaries from the definition of "employment" should be disregarded for purposes of the HI tax, and thus extended that tax (but not the OASDI tax) to judges' salaries.

Congress extended the OASDI tax to judges' salaries in the Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65, which again amended 26 U.S.C. 3121. The Social Security Amendments redefined "employment" in Section 3121(b)(5) generally to exclude "service performed in the employ of the United States," but also excluded from that exclusion service performed by federal judges, among others. See Pub. L. No. 98-21, § 101(b)(1), 97 Stat. 70. In addition, the Social Security Amendments amended Section 3121(u) to provide that, for the purpose of the Medicare tax, Section 3121(b) "shall be applied without regard to paragraph (5) thereof." See Pub. L. No. 98-21, § 101(b)(2), 97 Stat. 71. Because the Social Security Amendments excluded service by federal judges from the federal-employment exclusion from the general definition of "employment," it subjected federal judges to the HI and OASDI taxes of Section 3101, which fall on all wages in respect of employment, unless excluded. Because the same Act directed that the exclusion of federal employees in Section 3121(b)(5) be disregarded for HI tax purposes, it again brought federal employees, including judges, within the coverage of the HI tax.

federal civil service employees not participating in the CSRS. Those employees remain subject to HI and OASDI taxes today. See 26 U.S.C. 3121(b)(5) (1994 & Supp. IV 1998).

Congress brought federal employees, including federal judges, within the HI and OASDI systems in part out of concern that those employees were not paying their fair share of the cost of financing those benefit programs. When Congress in 1982 enacted legislation to bring federal employees within the HI system, the Senate Finance Committee noted as follows:

> Many active Federal civilian employees have worked long enough (or their spouses have) in employment covered by social security to become insured under the Hospital Insurance program. However, while most workers in covered social security employment are subject to the Hospital Insurance tax throughout their entire working careers, Federal employees may earn the same coverage with relatively fewer years of work subject to the tax. The committee believes that Federal workers should bear a more equitable share of the costs of financing the benefits to which many of them eventually become entitled.
>
> The bill, therefore, extends Medicare coverage to all members of the Federal workforce in the same way coverage is provided to most other workers.

Vol. I, S. Rep. No. 494, 97th Cong., 2d Sess. 378 (1982). Similarly, when Congress in 1983 enacted legislation to bring many federal employees (including federal judges) within the Social Security old-age benefit system, the House Ways and Means Committee observed that the expansion of coverage to include "several groups of workers previously excluded from participation in the program" was intended to "maintain the social security program on a sound financial basis"

and to "assur[e] both the short-term and long-term financial stability of the program." H.R. Rep. No. 25, 98th Cong., 1st Sess. 3 (1983).

2. On December 29, 1989, eight federal judges[4] (the "early-filing judges") filed suit against the United States in the United States Claims Court (predecessor to the Court of Federal Claims), contending that Congress had unconstitutionally diminished their compensation in violation of the Compensation Clause, U.S. Const. Art. III, § 1, when, on January 1, 1984, it made their judicial salaries subject to the OASDI tax.[5] Those eight judges were all sitting judges as of January 1, 1984, when the OASDI tax first became applicable to judicial salaries. The judges did not contend that Congress had diminished their prescribed statutory salary. Rather, they contended that the incidence of the OASDI tax on their salary on January 1, 1984, effectively and unconstitutionally diminished that salary, and that the unconstitutional diminution continued to the present day, despite substantial salary increases received by those judges after January 1, 1984.[6]

---

[4] Those eight judges were District Judges Hatter, Arceneaux, Beer, Burciaga, McNamara, Ramirez, and Wiseman, and Circuit Judge Pregerson. District Judges Bowen and Roettger were also plaintiffs in the original suit, but did not appeal from the adverse decision of the United States Claims Court. After the court of appeals reversed and remanded, however, Judges Bowen and Roettger rejoined the lawsuit, when several other judges also became plaintiffs. For statute of limitations purposes, Judges Bowen and Roettger are grouped with the "later-filing judges." See p. 7, *infra*.

[5] The Compensation Clause provides:

> The Judges, both of the supreme and inferior Courts, * * * shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

[6] From December 17, 1982, to December 31, 1983, just before Congress extended the OASDI tax to federal judges, circuit judges were paid an annual salary of $77,300, and district judges were paid an annual salary of $73,100. See Exec. Order No. 12,387, 47 Fed. Reg. 44,981 (1982). In 1984, after OASDI taxes were first imposed upon judicial salaries, the annual salaries of circuit judges were raised to $80,400, and those of district judges were raised to $76,000. Exec. Order No. 12,456, 49 Fed. Reg. 347 (1983), as amended by Exec. Order No. 12,477, 49 Fed. Reg. 22,041 (1984), and Exec. Order No. 12,487, 49 Fed. Reg. 36,493 (1984). Although the Executive Order increasing judges' salaries in 1984 was promulgated on September 1, 1984, the increase in judges' salaries was made retroactive to the first date of the first applicable pay period commencing on January 1, 1984. *Ibid.*; see App. 86a.

Since that time, federal judges have received additional salary increases. Circuit judges currently receive $149,900 annually, and district judges receive $141,300. See Exec. Order No. 13,144, 64 Fed. Reg. 72,242 (1999); see generally 28 U.S.C. 44 and 135, Historical Notes (describing salary increases from 1919 for circuit judges and district judges, respectively).

The Claims Court initially dismissed the suit for lack of jurisdiction on the ground that the judges had not filed administrative tax refund claims. App. 12a-18a. The court of appeals reversed, and ruled that the Claims Court had jurisdiction under the Tucker Act, 28 U.S.C. 1491(a)(1), notwithstanding the judges' failure to file tax refund claims. App. 19a-29a. The court of appeals reasoned that the judges "did not pursue a tax refund. Instead they sought damages for a violation of Article III, § 1—an action which is within the Tucker Act jurisdiction of the Claims Court." App. 26a. The court of appeals remanded the case for further proceedings.

3. On remand, the plaintiffs filed two amended complaints, which added eight judges (the "later-filing judges") as new plaintiffs.[7] The second amended complaint, filed on January 11, 1993, also challenged for the first time (on behalf of all respondents) the constitutionality of the HI tax, which was first imposed on judicial salaries on January 1, 1983. The parties cross-moved for summary judgment, and the Court of Federal Claims granted summary judgment for the United States, concluding that the application of the OASDI

---

[7] The eight new plaintiffs were, in addition to District Judges Bowen and Roettger (who rejoined the case after the remand, see p. 6, n.4, *supra*), District Judges Evans, Mentz, Owens, Wilhoit, Baker, and Mihm.

and HI taxes to respondents' judicial salaries was constitutional. App. 30a-53a.

4. The court of appeals reversed, and held that Congress's extension of the HI and OASDI taxes to the salaries of already-sitting federal judges violated the Compensation Clause. App. 54a-66a. The court found this case controlled by *Evans* v. *Gore*, 253 U.S. 245 (1920), which held that the Clause prohibited the imposition of the federal income tax on the salaries of sitting federal judges. App. 59a. The court acknowledged (App. 59a-60a) that this Court's subsequent decision in *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), had upheld the application of the income tax to the salaries of federal judges who took office after the income tax was enacted. It also noted (App. 60a) that this Court stated in *United States* v. *Will*, 449 U.S. 200, 227 n.31 (1980), that *O'Malley* had "undermine[d] the reasoning of *Evans*." Nonetheless, the court of appeals concluded that this Court had never directly overruled *Evans*. Following the Court's admonitions that, "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls," and that the lower courts must "leav[e] to this Court the prerogative of overruling its own decisions," the court of appeals concluded that "*Evans* governs this case more directly than *O'Malley*." App. 60a-61a (quoting *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)). It therefore remanded the case for a determination of the amount in which the HI and OASDI taxes had diminished respondents' compensation. App. 65a-66a.

5. The United States filed a petition for a writ of certiorari. Four Justices recused themselves from consideration of the petition. Because of those recusals, the Court lacked the necessary quorum of six Justices. See 28 U.S.C. 1. The Court therefore entered an order under 28 U.S.C. 2109, which provides that, when a quorum of the

Court is absent and a majority of the qualified Justices are of the opinion that the case cannot be heard at the next ensuing Term, the judgment of the court of appeals shall be affirmed with the same effect as an affirmance by an equally divided Court. See App. 69a.

6. On remand from the Federal Circuit, the Court of Federal Claims ruled that all the claims of the later-filing judges (see p. 7, *supra*) and all the respondents' claims based on the HI tax were barred by the six-year statute of limitations for actions against the United States (see 28 U.S.C. 2401(a) and 2501). App. 90a-105a. The court also ruled, as to the early-filing judges' claims based on the OASDI tax, that any constitutional violation had come to an end when Congress granted judges a salary increase that offset the OASDI tax applied to their salaries on January 1, 1984. App. 82a-89a. The court found a violation of the Compensation Clause only in the amount of OASDI tax imposed on the early-filing judges' salaries in their January 1984 salary payment. App. 77a.[8]

a. With respect to the statute of limitations, the court held that the HI claims and all the claims of the later-filing judges were filed more than six years after those claims had accrued, and rejected respondents' arguments that those claims were timely filed under the "continuing claim" doctrine. App. 101a-105a. The court questioned whether the continuing claim doctrine still exists at all, see App. 103a, but it did not resolve that question, for it concluded that doctrine would not govern the claims in this case in any event. The

---

[8] Judges are paid on the first day of each calendar month for services rendered during the previous month, and so the OASDI tax deducted from the judges' salary payments on January 1, 1984, was in fact a tax on their salaries earned during December 1983. App. 77a. The court ordered judgment in the amount of the OASDI tax deducted from judges' salaries on January 1, 1984—$328.95 for the seven early-filing district judges and $347.85 for the early-filing circuit judge—with compound interest. App. 77a, 110a-111a.

court noted that the continuing claim doctrine "provides that when the government owes a plaintiff a continuing, recurring duty to make payments of money, a new cause of action arises with each breach of that duty." App. 101a. But, the court stated, that doctrine does not apply here, where "the unlawful diminution consisted of imposition of two new taxes on specific effective dates." App. 105a. Those dates (January 1, 1983 and January 1, 1984), the court held, were the dates on which respondents' claims accrued.

b. The court also agreed with the government that statutory increases in judges' nominal annual salaries[9] in 1984 and thereafter had terminated the constitutional violation caused by the initial incidence of the OASDI tax on respondents' salaries. App. 78a-89a. The court began by observing that, "if, simultaneously with the imposition of a new tax, Congress granted an increase in salary which equaled or exceeded the tax, no diminution in the level of compensation just prior to imposition of the tax would have occurred." App. 79a. If that is so, the court reasoned, then any constitutional violation caused by the imposition of a new tax must also terminate when Congress raises judges' salaries "in an amount equal to or greater than the amount of the tax. * * * [I]f an increase in nominal salary occurred simultaneously with or subsequent to * * * a diminution, the simultaneous or subsequent increase accomplishes a cure to the extent of such increase." App. 82a.[10]

---

[9] The court defined "nominal annual salary" as "the stated lawful salary before deduction of federal and state income taxes, Social Security taxes and voluntary items." App. 86a & n.10.

[10] Otherwise, the court noted, Congress could never bring to an end a violation of the Compensation Clause caused by the initial application of a new tax except by repealing the tax (or specifically granting the affected judges a salary increase to compensate for the tax). The court observed that respondents had effectively argued that even "if Congress awarded all judges a pay raise of $1,000,000 per year retroactive to January 1, 1983 but not specifically or expressly related to the Social Security taxes imposed in 1983 or 1984, it would not cure the diminution resulting from

The court found that Congress had in fact raised judges' salaries in an amount greater than the OASDI tax imposed on those salaries on January 1, 1984. App. 86a-87a. It also calculated that judges' salary increases over the pre-1984 compensation base exceeded in each year the total amount that judges paid in HI and OASDI taxes in that year, until by 1993, the annual sums represented by the successive pay increases "are more than ten times higher than the total of Social Security taxes withheld during any calendar year." See App. 89a. Based on those facts, the court concluded that "no unlawful diminution in judicial compensation occurred" after respondents' salary increase in 1984 took effect. See App. 89a.

7. A panel of the court of appeals reversed the trial court's conclusion that the constitutional violation terminated upon the judges' first salary increase following the initial incidence of the OASDI tax, App. 116a-125a, but affirmed the dismissal of the HI tax and later-filing judges' claims as time-barred, App. 125a-127a.

On the former point, the court of appeals rejected the trial court's conclusion that no unconstitutional diminution in judicial compensation continues once Congress offsets a newly-levied tax by a general increase in judicial salaries that equals or exceeds the amount of the new tax. The court of appeals explained that it rejected the trial court's approach because, in the court's view, it "would create, with regard to judicial compensation, two different classes of judges." App. 122a. As the court of appeals put the matter, if the trial court's conclusion were upheld, then those judges who took office after Congress extended HI and OASDI taxes to sitting judges could enjoy "the full benefit of con-

---

imposition of the taxes. Under [respondents'] theory, all Social Security taxes withheld must be refunded to [respondents] and there can absolutely be no cure by subsequent increases in salary" granted to all federal judges. App. 83a-84a.

gressionally-granted salary increases" subsequent to those dates. App. 122a. On the other hand, those judges who took office before HI and OASDI taxes were applied to judicial salaries "would not receive the Congressionally-granted salary increases which became effective after 1983, because a significant portion of the increases would be allocated to pay the damage award to which they are entitled as a result of the earlier unconstitutional imposition." *Ibid.* The court also remarked that Congress had granted federal judges salary increases to adjust for inflation, and that "[t]o deprive the pre-1983 judges of the benefit of those increases by using them to offset the losses they incurred from the Government's earlier wrongful act would not only be unfair, but would be contrary to Congress's purpose in granting the increases." App. 125a. Thus, it held, any determination of the duration of a violation of the Compensation Clause and any calculation of damages must be "independent of any generally awarded adjustment to judicial salaries." *Ibid.*

8. Both the United States and respondents sought rehearing and rehearing en banc. The court denied the United States' petition. It granted respondents' petition, which sought rehearing en banc of the panel's decision affirming the dismissal of the HI tax clams and later-filing judges' claims as time-barred, and vacated the judgment of the panel. App. 128a-129a.

On rehearing en banc, the court held that, under the continuing claim doctrine, all of respondents' OASDI and HI claims were timely filed. App. 2a-11a. The court relied on *Friedman* v. *United States*, 159 Ct. Cl. 1 (1962), in which its predecessor, the Court of Claims, had sought to summarize the rules governing the accrual of claims in situations involving a series of periodic payments from the government. Under *Friedman*, the court stated, the continuing claim doctrine governs accrual of claims for payment that (a) need not be determined in the first instance by a federal agency, and (b) turn either on pure issues of law or on "sharp and

narrow" factual issues. App. 4a-6a. In such cases, the court held, a claim accrues anew each time the government incurs an alleged obligation to make a payment to the claimant. The court found respondents' claims in this case to fall within that category because "[n]o administrative officer or tribunal was given discretion to decide whether the judges were entitled not to pay" HI and OASDI taxes, and because the constitutionality of the application of HI and OASDI taxes to sitting judges' salaries involves a pure question of law. App. 7a.[11] The en banc court at that time also reinstated the judgment of the panel, which had reversed the Court of Federal Claims, and reinstated the panel's decision insofar as it had reversed the trial court's determination that the Compensation Clause violation came to an end when Congress granted judges a general salary increase. See App. 1a-2a.

REASONS FOR GRANTING THE PETITION

The court of appeals has held unconstitutional, as applied to federal judges appointed before January 1, 1983 and 1984, Acts of Congress that extended to federal employees the taxes financing the Medicare hospital insurance (HI) and

---

[11] The court rejected the view that the continuing claim doctrine does not apply to this case because it involves a claim based on a "single distinct event, which may have ill effects later on." App. 9a. The court stated that that language (which was drawn from one of its earlier decisions) was "simply descriptive of the type of case that falls outside the continuing claim doctrine," and did not purport to fix the distinguishing line between cases that call for application of the continuing claim doctrine and those that do not. *Ibid.* The court also disclaimed reliance on other statements in its earlier decisions that had found the continuing claim doctrine not to apply when "all necessary events had occurred" at an earlier time, or unless the claim was "inherently susceptible of independent and distinct events or wrongs." App. 11a. Such statements, the court concluded, "may be accurate ways of describing the events after-the-fact, but they do not contribute to the analysis" of the applicability of the continuing claim doctrine, which is henceforth to be governed exclusively by the *Friedman* factors. *Ibid.*.

Social Security old-age, survivors, and disability insurance (OASDI) programs. Almost every other wage and salary earner in this country is also required to pay those taxes, and they are tied to credits for coverage under the HI and OASDI programs, which Congress extended to judges when it also extended the taxes to their salaries. The court of appeals believed itself bound by this Court's decision in *Evans* v. *Gore*, 253 U.S. 245 (1920), to conclude that the extension of a tax to the salaries of federal judges is a diminution of those judges' compensation in violation of the Compensation Clause, even though it recognized that subsequent decisions of this Court have severely undermined *Evans*. That decision warrants review by this Court because it holds two Acts of Congress unconstitutional based on discredited authority that is inconsistent with the purposes of the Compensation Clause and should be definitively overruled.

The adverse effects of the court of appeals' ruling on the merits are exacerbated by its further decision rejecting the government's argument that any Compensation Clause violation has come to an end. The court of appeals held that the unconstitutional diminution of the judges' salaries caused by the taxation of those salaries continued even after Congress raised those salaries above the level at which they had been before the taxes were first applied to judges. In effect, the court has held that Congress can never terminate an unconstitutional diminution of judges' salaries caused by taxation, except by repealing the taxation of the judges' salaries entirely, or by granting a special salary increase only to the class of judges who were appointed before the tax took effect (thereby creating two classes of judges compensated differently). The court's decisions seriously impair Congress' ability to subject judges' salaries to nondiscriminatory forms of income tax.

Although no other circuit has considered the precise issues presented in this case, the Federal Circuit and the

Court of Federal Claims are courts of nationwide jurisdiction.[12] Further, the court of appeals has effectively held that the constitutional violation caused by extension of the HI and OASDI taxes to a sitting judge's salary continues as long the judge continues to draw a salary that was once supposedly diminished by those taxes. Any federal judge, therefore, who held a judicial position before January 1, 1984, and still held the same position as of six years ago may now challenge the HI and OASDI taxes by filing suit in the Court of Federal Claims to gain the benefit of the court of appeals' decision in this case.[13] Several other federal judges have, in fact, filed such lawsuits.[14]

This Court should grant review to resolve definitively a matter of considerable importance touching on the relations between the Legislative and Judicial Branches. This Court's review is particularly important because the court of appeals believed that it had no authority to depart from this Court's decision in *Evans* v. *Gore*. Thus, absent review by this Court, *Evans* v. *Gore* will become fixed as the law of the land

---

[12] A related issue, which has arisen in the Eleventh Circuit, concerns whether the Compensation Clause bars the application of a county occupation tax to the salaries of federal judges who were appointed before the tax was enacted (but after state law authorized the county to impose such a tax). The Eleventh Circuit recently held that tax valid. *Jefferson County* v. *Acker*, 210 F.3d 1317, 1321-1322 (2000). The Eleventh Circuit noted that it was "unpersuaded" by the reasoning of the Federal Circuit in this case. *Id.* at 1321 n.5.

[13] The limitation period for civil actions against the United States is six years after the accrual of the claim. See 28 U.S.C. 2401(a). Thus, any judge who either retired or was appointed to a new judicial position at least six years ago would no longer have a cause of action to recover the taxes that had been deducted from that judge's old salary. Federal judges who were appointed to a new judicial position after the 1984 salary increase took effect would not have a claim based on the taxes deducted from their new salaries, because the salaries would already have been subject to HI and OASDI tax at the time of the new appointment.

[14] In appendix to this petition (App. 133a-136a) we have attached a list of the other pending lawsuits and our most current information regarding the federal judges who have joined those lawsuits.

on the permissibility of taxation of federal judges' salaries, even though this Court long ago disapproved the reasoning of that decision.

1. a. There is a threshold question whether a quorum of the Court is available to hear and decide this case. When the government filed its previous certiorari petition in this case, four Justices recused themselves, and so the Court did not have the necessary quorum of six Justices. See 28 U.S.C. 1. Because of the lack of a quorum, the Court entered an order under 28 U.S.C. 2109, affirming the decision of the court of appeals.

The Justices who recused themselves from considering our prior petition did not state reasons for their recusals. It appears, however, that the recusing Justices already held a judicial position on the dates that Congress extended the HI and OASDI taxes to judges' salaries, and either (a) retained that same judicial position when our prior certiorari petition was before the Court, or (b) had been appointed to a new judicial position after the taxes were extended to judicial salaries, but less than six years before our petition was before the Court.[15] The recusing Justices, therefore, may have perceived that they still potentially had a cause of action to challenge the HI and OASDI taxes that was not barred by the six-year statute of limitations for civil claims against the United States, see 28 U.S.C. 2401(a), and that that potential claim required their recusal under 28 U.S.C. 455(b)(4).[16]

[15] Conversely, the Justices who did not recuse themselves either (a) were not federal judges when Congress extended the HI and OASDI taxes to judges' salaries, or (b) had been appointed to a new judicial position more than six years before our prior petition was before the Court.

[16] Section 455(b)(4) provides that a judge or Justice shall disqualify himself when he knows that he "has a financial interest in the subject matter in controversy * * * or any other interest that could be substantially affected by the outcome of the proceeding."

As an initial matter, we note that the Rule of Necessity may permit all of the Justices to hear and decide this case, even if some Justices might have a potential claim that would otherwise suggest recusal under Section 455(b)(4). See generally *United States* v. *Will*, 449 U.S. 200, 213-216 (1981). This case involves fundamental matters touching on the relation between the Legislative and Judicial Branches, and in that sense it potentially affects all federal judges.[17] Moreover, the financial interest that a Justice might have in this case arises solely out of the emoluments of the judicial office, rather than out of matters that are personal to the individual Justice. It is therefore noteworthy that in the Court's three previous cases concerning the constitutionality of the application of the income tax to judicial salaries, the entire Court heard and decided those cases. See *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939); *Miles* v. *Graham*, 268 U.S. 501 (1925); *Evans* v. *Gore*, 253 U.S. 245 (1920); see also *Will*, 449 U.S. at 215 & n.18. *O'Malley* is particularly instructive in this regard, because the salaries of four of the Justices were subject to the income tax statute under review in that case, and the Court therefore would have been denied a quorum if they had recused themselves, and yet all the Justices participated.[18]

Moreover, if the Court cannot decide this case because of the lack of a quorum, the public will be denied the opportunity for an authoritative disposition on important questions concerning the constitutionality of two Acts of Congress. That point is particularly crucial here since the Federal

[17] That is especially true since the reasoning of the court of appeals' decision might suggest that Congress could not even raise the rate of existing income taxes on the salaries of sitting federal judges. See p. 28 n.26, *infra*.

[18] See *O'Malley*, 307 U.S. at 279 (noting that the tax applied only to salaries of judges taking office after June 6, 1932). Justices Black, Reed, Frankfurter, and Douglas took office after June 6, 1932. See *The Oxford Companion to the Supreme Court* 969 (Kermit L. Hall ed., 1992).

Circuit, a court of nationwide jurisdiction, believed itself bound to follow a decision of this Court (*Evans* v. *Gore*) that, it stated, remains controlling on lower courts unless and until it is definitively overruled by this Court, even though the court also acknowledged that that decision has been seriously undermined. Absent review by this Court, therefore, the Federal Circuit's decision following *Evans* will be the law of the land, even though (as we explain below) it is quite likely that *Evans* does not reflect this Court's current Compensation Clause jurisprudence. The Court has also explained that it is important that the federal courts be available to decide claims involving judicial compensation because "the Compensation Clause is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary." *Will*, 449 U.S. at 217. The public interest therefore strongly favors this Court's review of the Compensation Clause issues in this case.

In any event, it appears that, even if the Rule of Necessity is not applicable here, the necessary quorum may now be available. Since the time that our previous certiorari petition was before the Court, almost three years have passed. The six-year statute of limitations for actions against the United States may now bar any Compensation Clause claim based on the HI and OASDI taxes by some of the Justices who previously recused themselves, if they have not already joined one of the pending lawsuits challenging the HI and OASDI taxes (see p. 15, n.14, *supra*) or filed an administrative tax-refund claim with the Internal Revenue Service.[19]

[19] We are not aware that any Justice has joined one of the pending lawsuits. The court of appeals noted, however, that judges seeking to challenge the HI and OASDI taxes also had the option of pursuing administrative tax refund claims (although they were not required to do so). App. 26a. Because of statutes protecting the confidentiality of tax return information, see 26 U.S.C. 6103, we may not inquire of the IRS whether any judge or Justice has filed a tax refund claim. We note, however, that any administrative tax refund claim must be filed within two years after the tax is paid or three years after the tax return is filed, a period less generous than the six-year limitation period that has been applied in this case by the lower courts. See 26 U.S.C. 6511(a), 6513(c).

Because of the six-year statute of limitations, a Justice would not have a claim, and therefore would not have a potential financial interest suggesting recusal under Section 455(b)(4), if that Justice was appointed to his or her current judicial position between January 1, 1984 (the date on which Congress extended OASDI taxes to judicial salaries) and a date more than six years before the date on which the Court acts on this certiorari petition. Accordingly, circumstances that previously indicated recusal may no longer be present.[20]

b. If a quorum of the Court is present, another threshold issue is whether the "law of the case" doctrine prevents the Court from examining in plenary fashion the merits of the Compensation Clause issue that was presented to the Court in our prior certiorari petition.[21] We submit it does not. The order entered by the Court on our prior petition under 28 U.S.C. 2109 was an order affirming the judgment below "with the same effect as upon an affirmance by equally divided Court." App. 69a. But although such an order is denominated an affirmance, "this is only the most convenient mode of an expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment." *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1868); see *Neil* v. *Biggers*, 409 U.S. 188, 190-192 (1972) (holding that, for purposes of the federal habeas corpus statute, an affirmance by a tie vote is not an "actual adjudication" by this Court). Such an order does not establish precedent

[20] When this case was before the Court on our prior petition, respondents acknowledged (95-1733 Br. in Opp. 25, 27, 29) that any Justice who was appointed after January 1, 1984, but more than six years before the Court's consideration of the case was not disqualified from participating in the case.

[21] The issue of the date of the termination of the constitutional violation (pp. 26-29, *infra*), which was not before the Court in our prior petition, does not implicate the law of the case doctrine.

binding on this Court. See *United States* v. *Pink*, 315 U.S. 203, 216 (1942).

Nor does such an order prevent this Court from examining the issue in plenary fashion in the same case. The doctrine of law of the case generally provides that "a court should not reopen issues decided in earlier stages of the same litigation." *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997). The law of the case doctrine thus promotes judicial efficiency, stability of the law, and respect for the courts' decisionmaking authority by discouraging parties from repeatedly challenging decisions that a court has already made. But a basic premise of the doctrine is that it prevents a court from reopening an issue only if the court actually decided that issue at an earlier stage of the litigation. See *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979) ("The doctrine of law of the case comes into play only with respect to issues previously determined."). In this case, the Court did not actually decide the merits of the Compensation Clause issue when our prior petition was before it. Indeed, the Court as a Court did not even examine the merits of that issue, because a quorum was not present; the Court's judgment affirming the decision of the Federal Circuit was entered solely by operation of law. The policies supporting the law of the case doctrine, discouraging wasteful and pertinacious relitigation of issues that a court has thoroughly considered, do not apply in a situation like this.

The law of the case doctrine, moreover, "directs a court's discretion, it does not limit the tribunal's power." *Arizona* v. *California*, 460 U.S. 605, 618 (1983); see *Messenger* v. *Anderson*, 225 U.S. 436, 444 (1912). Rather, "[a] court has the power to revisit prior decisions of its own or of a coordinate court in any circumstance." *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988). Law of the case does not prevent courts from reexamining earlier decisions that are "clearly erroneous and would work a manifest injustice." *Agostini*, 521 U.S. at 236. This is such a situation.

As we now explain, the court of appeals' invalidation of the extension of HI and OASDI taxes to judicial salaries rests entirely on a decision that interpreted the Compensation Clause in a manner that has been thoroughly discredited. That decision should now be definitively repudiated.

2. a. Congress did not violate the Compensation Clause when it extended HI and OASDI taxes to judicial salaries. In finding a constitutional violation, the court of appeals believed itself bound by this Court's decision in *Evans* v. *Gore*. In *Evans*, the Court held that the Compensation Clause barred the application of the income tax to federal judges' salaries. That decision should now be overruled.

Evans involved an income tax levied under a 1919 statute on the salary of a federal judge appointed in 1899 (see 253 U.S. at 246), but the opinion did not limit the holding to situations in which the judge's appointment predated the imposition of the tax. Rather, the majority relied (*id.* at 255) on intergovernmental tax immunity cases such as *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1871), and *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), for the broad proposition that the Framers "were so sedulously bent on securing the independence of the judiciary [that they] intended to protect the compensation of the judges from assault and diminution in the name and form of a tax[.]" 253 U.S. at 256. On that premise, the Court concluded that a judge's "compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support." *Id.* at 263.[22]

---

[22] Justice Holmes, joined by Justice Brandeis, dissented, stating that the imposition of an income tax upon judges is constitutional as long as it does not single out judicial compensation but, rather, applies with like force to all citizens. Justice Holmes argued that the constitutional imperative of protecting judicial independence "is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others." 253 U.S. at 265. "To require a man to pay the taxes that all other men have to pay," he continued, "cannot possibly be

In *Miles* v. *Graham*, 268 U.S. 501 (1925), the Court relied on *Evans* to hold that the Compensation Clause barred the imposition of an income tax on the salary of a judge appointed after the enactment of the tax (see *id.* at 505). The Court concluded that the compensation was fixed by statute, "and to exact a tax in respect of this would diminish it within the plain rule of *Evans* v. *Gore*." *Id.* at 509.

Fourteen years later, however, the Court abandoned "the plain rule of *Evans* v. *Gore*" and embraced the view that judicial salaries are as subject to taxation in the same manner as the salaries of other citizens. In *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), the Court, considering another attempt by Congress to require judges to pay income tax, held that "a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition" of the Constitution. *Id.* at 282. To subject judges to a general tax "is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *Ibid.*

O'Malley expressly overruled *Miles*. 307 U.S. at 282-283. It did not expressly overrule *Evans*, for Congress had structured the income tax act under review in *O'Malley* "to avoid, at least in part, the consequences of" *Evans* by making the tax applicable only to the salaries of judges appointed after its effective date. See *id.* at 280. The Court did, however, strongly disapprove the reasoning of *Evans*:

---

made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends." *Ibid.*

> [T]he meaning which *Evans* v. *Gore* imputed to the history which explains Article III, § 1, was contrary to the way in which it was read by other English-speaking courts. The decision met wide and steadily growing disfavor from legal scholarship and professional opinion. *Evans* v. *Gore* itself was rejected by most of the courts before whom the matter came after that decision.

307 U.S. at 281 (footnotes omitted).[23]

The Court reexamined *O'Malley*, *Miles*, and *Evans* in *United States* v. *Will*, *supra*. In *Will*, the Court held that Congress may not withdraw an increase in a statutorily prescribed judicial salary once it has gone into effect, but that Congress may cancel a prospective statutory salary increase before it takes effect. The Court disapproved the district court's reliance on *Evans* as a basis for holding that the rescission of a salary increase before its effective date reduces the amount of compensation that a judge has been promised. 449 U.S. at 200. Rather, the Court stated:

> In *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), this Court held that the immunity in the Compensation Clause would not extend to exempting judges from paying taxes, a duty shared by all citizens. The Court thus recognized that the Compensation Clause does not forbid everything that might adversely affect judges. The opinion concluded by saying that to the extent *Miles* v. *Graham*, 268 U.S. 501 (1925), was inconsistent, it "cannot survive." 307 U.S. at 282-283. Because *Miles*

---

[23] Justice Butler's dissent in *O'Malley* also noted that, "[e]vidently, the Court intends to destroy the decision in *Evans* v. *Gore*. Without suggesting that there is any distinction between that case and *Miles* v. *Graham*, it declares that the latter 'cannot survive.'" 307 U.S. at 297. The Eleventh Circuit also recently observed that this Court "had much to say in its *O'Malley* opinion about the *Evans* decision, and none of it was flattering." *Jefferson County*, 210 F.3d at 1319.

relied on *Evans* v. *Gore*, *O'Malley* must also be read to undermine the reasoning of *Evans*.

449 U.S. at 227 n.31.[24]

b. The court of appeals attempted to reconcile *Evans* and *O'Malley* by reading *Evans* to hold that Congress may not impose *new* taxes on the salaries of already-sitting federal judges (even if those taxes do not discriminate against judges), even though under *O'Malley*, "nondiscriminatory taxation of a judge who took office after the tax went into effect does not violate the Compensation Clause." App. 64a. The court's reasoning was that, in the former case, the already sitting judge's compensation is "diminished" by the effect of the new tax, while in the latter case, "the taxation formed part of that judge's compensation scheme from the outset of his tenure." *Ibid.* That interpretation of the Compensation Clause reflected in the court of appeals' opinion is erroneous: the Clause does not bar Congress from applying nondiscriminatory taxes to the salaries of already sitting federal judges. Because the court of appeals believed that its decision was compelled by the lingering precedential force of *Evans*, this Court should grant review to overrule *Evans* definitively, and make clear that the imposition of a nondiscriminatory tax on the salary of a federal judge does not unconstitutionally "diminish" that judge's compensation, whether the tax was enacted before or after the judge took office.

The Court in *Evans* relied on its earlier intergovernmental tax immunity decisions, as well the observation that "the power to tax carries with it the power to embarrass and destroy," to conclude that the Framers must have intended

[24] See also *Jefferson County*, 210 F.3d at 1320 (observing that "in *Will* the Supreme Court itself read *O'Malley* as undermining the reasoning in *Evans*, and it characterized the holding of *O'Malley* broadly, saying that the Compensation Clause did not exempt judges from paying the same taxes that other citizens paid").

"to protect the compensation of the judges from assault and diminution in the name or form of a tax[.]" 253 U.S. at 256 (internal quotation marks omitted). Those rationales have not survived closer scrutiny over time. The intergovernmental immunity cases on which the Court relied by analogy have been thoroughly repudiated. See *South Carolina* v. *Baker*, 485 U.S. 505, 520, 524 (1988) (overruling *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)); *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939) (overruling *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1871)); see also *Jefferson County* v. *Acker*, 527 U.S. 423, 436-437 (1999). In particular, in *Graves*, decided the same Term as *O'Malley*, the Court noted that the purpose of intergovernmental tax immunity is "not to confer benefits on [governmental] employees by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy * * * [,] but to prevent undue interference with one government by imposing on it the tax burdens of the other." 306 U.S. at 483-484. The Court held there that a nondiscriminatory state income tax that falls on federal employees as well as others does not "impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions." *Id.* at 480-481.

The Court's decisions since *Evans* also disavow the notion that the application of nondiscriminatory federal taxes to the salaries of federal judges implicates "the power to destroy" the federal judiciary, such that the Compensation Clause is violated. As the Court explained in *Will*, the purpose of the Clause is to secure "a truly independent judiciary, free of improper influence from other forces within government." 449 U.S. at 218. But the application of nondiscriminatory taxes to judicial salaries poses no threat to the constitutional value of judicial independence protected by the Clause. Rather, such nondiscriminatory taxation merely reflects the view, endorsed by this Court, that "judges are also citizens,

and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *O'Malley*, 307 U.S. at 282; see also *Will*, 449 U.S. at 226 ("Federal judges, like all citizens, must share the material burden of the government."). That is true whether Congress imposes an entirely new tax on the income of all citizens, including federal judges, or (as in this case) brings federal judges' salaries within the coverage of a tax that has long been applied to the vast majority of the paid labor force (and made judges eligible for the HI and OASDI programs based on their judicial service).[25]

3. The court of appeals also held that the measure of damages in a case brought under the Compensation Clause is "independent of any generally awarded adjustment to judicial salaries." App. 125a. Thus, under the court of appeals' decision, a violation of the Clause caused by the application of a tax to judicial salaries continues as long as

[25] Nothing in the circumstances surrounding Congress's extension of the HI and OASDI taxes to judicial salaries suggests that Congress intended to undermine the independence of federal judges. Indeed, Congress has almost doubled federal judicial salaries since 1983. See pp. 6-7, n.6, *supra*. Rather, Congress ensured that judges are treated, for purposes of the Social Security and Medicare programs, in the same way as the 90% of the paid civilian labor force that pays Social Security taxes and accrues eligibility for Social Security and Medicare benefits after retirement. Nor do the HI and OASDI taxes discriminate against federal judges. It is true that, when Congress extended the OASDI tax to all federal employees, it allowed federal employees who were already covered by the CSRS retirement system (see p. 3, *supra*) to choose between coverage under CSRS and Social Security, whereas it did not afford judges that election. Those federal employees, however, were required by law to contribute to the CSRS system, see 5 U.S.C. 8334(a)(1) (1994 & Supp. IV 1998), and so Congress allowed them to "opt out" of Social Security in order to avoid a double deduction. Congress had no occasion to give federal judges a similar election, because federal judges' full-salary retirement annuity, 28 U.S.C. 371(a), requires no salary contribution from judges, but rather is financed out of general tax revenues.

that tax remains in effect, even if Congress subsequently (or perhaps even simultaneously) increases judicial salaries in an amount far greater than the amount of the tax deduction. That ruling cannot be reconciled with the text or policies of the Clause.

The Clause provides that federal judges shall "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Even if Congress "diminished" the compensation of sitting judges when it imposed HI and OASDI taxes on their preexisting salaries, that "diminution" surely came to an end when, in 1984, Congress raised those judges' salaries in an amount greater than the incidence of the taxes on their pre-tax salaries. A new tax can only be said to "diminish" a judge's compensation to the extent that it leaves the judge with less compensation than the judge received before the tax took effect. Cf. *Will*, 449 U.S. at 226-229 (holding that Congress did not unconstitutionally diminish judges' salaries when it canceled salary adjustments before their effective date). To be sure, the increase in respondents' net compensation was not so large as it would have been if the HI and OASDI taxes had not been withheld. But the Compensation Clause prohibits Congress only from decreasing judicial compensation; Congress has discretion to decide what increases in compensation should be given. See *id.* at 227.

The court of appeals believed that the Compensation Clause violation continued independent of any general judicial salary increases because, in its view, a different rule would create two classes of judges: those appointed after the taxes were extended to judicial salaries, who would enjoy the full extent of the general salary increases, and those appointed before application of the taxes, who would be required to pay "out of their own salaries, including generally-granted increases, the damages owed to them by the Government." App. 122a. But once Congress increased judicial salaries above the level that existed before the

incidence of the tax, there was no more diminution that required payment of damages. Moreover, the court of appeals' ruling itself creates two classes of judges with different compensation packages: federal judges appointed after the 1984 salary increase took effect must pay HI and OASDI taxes on their current annual salaries, whereas judges appointed before that date receive a permanent immunity from paying those taxes (even though they are eligible for HI and OASDI benefits based on their judicial service). The court of appeals' decision therefore creates serious inequities in judicial compensation.

The effect of the court of appeals' ruling on damages is that Congress may never bring to an end a Compensation Clause violation caused by taxation of judicial salaries except by repealing the offending tax (or, perhaps, by granting the affected judges a special salary increase, thereby compensating them differently from all other federal judges). As a practical matter, that ruling casts a serious cloud on Congress's authority to extend nondiscriminatory taxes, paid by the general population, to judicial salaries. If Congress wants to apply such a tax to judicial salaries, it must grant sitting judges a permanent exemption from the tax.[26] That requirement creates inequities among Article III

[26] The reasoning of the court of appeals' decisions might well prevent Congress from subjecting sitting federal judges to nondiscriminatory increases in the *rate* of taxes such as the income tax and the OASDI tax (and from decreasing deductions and credits applicable to such taxes). If, as the court of appeals concluded, the incidence of a new tax on a pre-existing salary of a federal judge unconstitutionally "diminishes" the amount of a pre-tax salary, then increases in the tax rate might also be said to diminish the amount of the judge's compensation before that increase took effect. But if that is so, then the court of appeals' decision, especially as compounded by its ruling on damages, creates extraordinary difficulties in tax administration. Congress would effectively be required either (a) to freeze the rate of any tax applicable to judicial salaries to the rate in effect when each judge was appointed, or (b) to subject federal judicial salaries only to the lowest income tax rate that was applicable when any sitting member of the judiciary first took office. Nothing in the

judges. Congress could, of course, exempt all judges from new taxes, but that approach creates inequity between Article III judges and all other citizens, as this Court recognized in *O'Malley*, when it made clear that "judges are also citizens" who do not have "an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." 307 U.S. at 282.[27]

text or background of the Compensation Clause suggests that the Framers intended to relegate Congress to such a welter.

[27] We have not presented as a separate question for review the application of the continuing claim doctrine to the statute of limitations issue in this case; the court of appeals' resolution of that issue will lose its binding and precedential force if this Court reverses the judgment of the court of appeals on either of the questions that we have presented. The court of appeals vacated the initial judgment of the panel when it granted rehearing en banc, App. 129a, and subsequently reinstated a single judgment, reversing the Court of Federal Claims, which resolved all issues before the court on that appeal, App. 1a-2a. It is that judgment that is now presented to this Court for review. Furthermore, the court of appeals decided that respondents could invoke the continuing claim doctrine on the premises that a constitutional violation had been established and that that violation had not terminated when Congress increased judges' salaries after first applying HI and OASDI taxes to those salaries. See App. 7a ("[T]here is merit to the argument of the judges that these periodic deductions, which have been ruled to be unlawful, should be treated as a continuing claim."). But if this Court concludes that either of those premises is incorrect, then there would be no basis for the court of appeals' conclusion that the claimed Compensation Clause violation was the kind that may be asserted as a continuing claim. If this Court reverses the court of appeals on either ground, then the violation (if any) for any respondent would not have continued past 1984, and no respondent could rely on the continuing claim doctrine, whether or not that doctrine might have force in any other setting. See App. 90a (Court of Federal Claims notes that "application of the concept of cure * * * has potential application to a complete resolution" of claims based on the HI tax or brought by later-filing judges), 105a (also noting that, even if the continuing claim doctrine is applicable, those claims "would not result in recovery of damages even if they could be addressed as continuing claims").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General
DAVID W. OGDEN
Acting Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
PAUL R.Q. WOLFSON
Assistant to the Solicitor General
DAVID M. COHEN
DOUGLAS N. LETTER
JEANNE E. DAVIDSON
KATHLEEN MORIARTY MUELLER
ANNE MURPHY
Attorneys

JUNE 2000

Supreme Court, U.S.
FILED
991978 JUN 8 - 2000
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Acting Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL R. Q. WOLFSON
Assistant to the Solicitor General

DAVID M. COHEN
DOUGLAS N. LETTER
JEANNE E. DAVIDSON
KATHLEEN MORIARTY MUELLER
ANNE MURPHY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

138PP

TABLE OF CONTENTS

	Page
Appendix A (opinion of en banc court of appeals, Feb. 9, 2000)	1a
Appendix B (opinion of United States Claims Court, Nov. 9, 1990)	12a
Appendix C (opinion of court of appeals, Jan. 16, 1992)	19a
Appendix D (opinion of Court of Federal Claims, June 22, 1994)	30a
Appendix E (opinion of court of appeals, Aug. 30, 1995)	54a
Appendix F (order of court of appeals denying rehearing and rehearing en banc, Dec. 26, 1995)	67a
Appendix G (order of Supreme Court affirming for lack of quorum, Oct. 7, 1996)	69a
Appendix H (opinion of Court of Federal Claims, June 6, 1997)	70a
Appendix I (opinion of court of appeals, Aug. 5, 1999)	112a
Appendix J (order of court of appeals granting and denying petitions for rehearing and rehearing en banc and vacating panel decision, Dec. 20, 1999)	128a
Appendix K (constitutional and statutory provisions involved)	130a
Appendix L (list of other cases and judges challenging OASDI and HI taxes)	133a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 97-5093

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., DOLORES LEE BURCIAGA, EXECUTRIX OF THE ESTATE OF CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

ORDER

[Feb. 9, 2000]

Before: MAYER, Chief Judge, NEWMAN, Circuit Judge, ARCHER, SENIOR CIRCUIT JUDGE, MICHEL, PLAGER, LOURIE, CLEVENGER, RADER, SCHALL, BRYSON, and GAJARSA, Circuit Judges.

IT IS ORDERED THAT:

The judgment of the court entered on August 5, 1999 be reinstated. The opinion reported at 185 F.3d 1356 (Fed. Cir. 1999) remains in effect as to parts 1 and 2. The opinion of the court en banc issued today supercedes part 3 of that opinion.

PLAGER, Circuit Judge.

On August 5, 1999, this court issued its opinion and judgment in *Hatter* v. *United States*, 185 F.3d 1356 (Fed. Cir. 1999) (*Hatter VII*).[1] In *Hatter VII* we were called upon to review the decision of the Court of Federal Claims regarding the measure of damages to be awarded to the plaintiff judges who had been subjected to a previously-declared, *see Hatter* v. *United States*, 64 F.3d 647 (Fed. Cir. 1995) (*Hatter IV*), unconstitutional diminution in compensation, and to review the ruling by the Court of Federal Claims regarding the application of the statute of limitations to these damages claims, *see Hatter* v. *United States*, 38 Fed. Cl. 166 (1997) (*Hatter VI*).

Subsequently both parties petitioned for rehearing by the panel which issued *Hatter VII*, and, failing that, for rehearing by the court en banc. By Order dated December 20, 1999, we reported the denial of both petitions for rehearing by the panel. With regard to the

[1] The history of this case now involves the following seven decisions: *Hatter* v. *United States*, 21 Cl. Ct. 786 (1990) (*Hatter I*), *Hatter* v. *United States*, 953 F.2d 626 (Fed. Cir. 1992) (*Hatter II*), *Hatter* v. *United States*, 31 Fed. Cl. 436 (1994) (*Hatter III*), *Hatter* v. *United States*, 64 F.3d 647 (Fed. Cir. 1995) (*Hatter IV*), *United States* v. *Hatter*, 519 U.S. 801, 117 S. Ct. 39, 136 L.Ed.2d 3 (1996) (*Hatter V*), *Hatter* v. *United States*, 38 Fed. Cl. 166 (1997) (*Hatter VI*), and *Hatter* v. *United States*, 185 F.3d 1356 (Fed. Cir. 1999) (*Hatter VII*).

petitions for rehearing en banc, the court en banc granted the petition of the appellants, Terry J. Hatter, Jr., et al., and denied the petition of the appellee, the United States. In the Order, the judgment of the court in *Hatter VII* was vacated, and the opinion of the court accompanying the judgment was withdrawn with respect to part 3 thereof.[2]

Part 3 of the court's opinion in *Hatter VII* addressed the statute of limitations issue. The question was whether the moneys wrongfully withheld from the judges' monthly paychecks constituted a "continuing claim," as that term is understood in the jurisprudence of this court. In *Hatter VII*, the court concluded that it did not. After full consideration of the petition by the plaintiffs/appellants and the Government's response, the court en banc concluded that, with regard to the statute of limitations issue, the opinion in *Hatter VII* did not give adequate weight to this court's precedents; accordingly, part 3 of the opinion in *Hatter VII* was withdrawn. Following is the en banc court's opinion and judgment regarding that issue.

* * * * * *

3.

As explained in this court's opinion of August 5, 1999, (*Hatter VII*), the judgment of the trial court must be reversed and the matter must be returned to the Court of Federal Claims for determination of damages consistent with that opinion. There remains a disputed issue that needs resolving regarding the application of the statute of limitations. Under the law, a claim against

[2] The disposition of the vacated judgment in *Hatter VII* is dealt with in a separate Order of the court, issued this date.

the Government for money damages must be filed within six years of the time the claim first accrues. 28 U.S.C. § 2501. Failure to file within the time period imposed by the statute of limitations means that the Government may raise the statute as an affirmative defense. The six years begins to run when the cause of action accrues.

The judges argue that this case is controlled by what is known as the continuing claim doctrine. Under that doctrine, each time moneys are deducted from the judges' pay and paid into the Treasury of the United States, a new cause of action accrues. Thus, any judge whose salary was or is subject to the unconstitutional imposition can file a claim for each deduction within six years from the time the deduction is made; claims for deductions made longer ago than six years from the time suit is filed would be barred.

The Government argued, and the trial court agreed, that the continuing claim doctrine did not apply to this case. On appeal, this court in its August 5th opinion held with the Government, and affirmed that part of the trial court's judgment. *See Hatter VII*, 185 F.3d. at 1363. As we indicated earlier, on further review and after considering appellants' petition for rehearing and the Government's brief in opposition, the court is of the view that the original opinion did not give sufficient weight to our precedents, and that the Government's arguments are unsound in this respect.

In a 1962 seminal opinion, this court's predecessor, the Court of Claims, addressed the question of how to apply the six year statute of limitations to claims against the Government when the claims involve payments from the Government that were to be made in a

series or periodically. *See Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F.2d 381 (1962).[3] Judge Davis, writing for a unanimous court, examined the governing policies and precedents at length, citing over a hundred cases that had been reviewed. Though admitting that not every case was fully consistent in language, and occasionally in outcome, the court identified two basic categories of cases that emerged from its jurisprudence.

The first was those cases in which the repeated government action (or failure to act) resulted in repeated causes of action. The court described those cases as having the following characteristics: (1) the case turned on pure issues of law, or on specific issues of fact which the court was to decide for itself; (2) Congress had not interposed an administrative agency or officer charged with the duty of determining the claimant's eligibility for the money claimed (*i.e.*, there was no discretionary administrative decision at issue), and (3) if fact issues were involved, they were "sharp and narrow." *Id.* 310 F.2d at 384-85.

The cases the court had in mind were the pay cases—those in which the claimant was suing "for additional pay at a higher grade, or claiming greater compensation (under a statute or regulation) than the claimant was receiving, or seeking special statutory increments or allowances, etc." *Id.* at 384. In such a case, when "no administrative agency has been set up to decide the claim, and the court passes de novo on all issues of law and fact—the 'continuing claim' doctrine is

---

[3] We are of course bound by the decisions of our predecessor court, until modified or overruled by this court en banc. *See Newell Cos.* v. *Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988).

wholly appropriate and in accord with the general jurisprudence in this country on the statute of limitations." *Id.* at 385. The court went on to note that "[u]nder those general principles the cause of action for pay or compensation accrues as soon as the payor fails or refuses to pay what the law (or the contract) requires; . . . [a]nd where the payments are to be made periodically, each successive failure to make proper payment gives rise to a new claim upon which suit can be brought." *Id.*

The court contrasted those cases with the cases in the second category, cases "in which the cause of action does not accrue until after a determination entrusted by Congress to an administrative official. . . . In those instances, the claim does not accrue until the executive body has acted (if seasonably asked to act) or declines to act." *Id.* The general rule here is that "in appropriate cases conditions precedent to the accrual of a cause of action can be established by statute, contract, or common law, and that where such a condition precedent has been created the claim does not ripen until the condition is fulfilled." *Id.* at 386. The kinds of cases the court listed here typically involved those in which a statute required a demand upon an executive official before payments were due. *See id.* at 386.

As the court saw it, the touchstone between the two categories was that "'continuing claims' . . . are independent of administrative determination[,] and those other claims [are] dependent on prior administrative evaluation." *Id.* at 387. Applying this principle to the case before it, the court concluded that a claim for entitlement to disability retirement pay, of the type requiring discretionary action by a board or executive

official, is not a continuing claim, but accrues as a whole, once it accrues. On the other hand, other types of pay claims not dependent on a discretionary finding—including claims for increased retirement pay because of new legislation, etc.—are continuing claims. *See id.* at 396.

In the case before us, suit was brought not as a class action but on behalf of the individually named judges. In that regard, there are distinct causes of action arising under two different statutes. The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, imposed the Hospital Insurance portion of the Social Security tax on federal judges effective January 1, 1983; the Old Age and Survivors Disability Insurance portion of the Social Security tax was imposed on federal judges by the Social Security Amendments of 1983, Pub. L. No. 98-21, and was effective January 1, 1984.

In both cases, each month after the Acts became effective the Government automatically deducted from the judges' salary checks the amount, calculated by formula, that was due under the tax. No administrative officer or tribunal was given discretion to decide whether the judges were entitled not to pay the tax, or whether the judges had to pay only some of it. The question of whether the monthly tax deduction would occur was determined as a pure issue of law—all judges were to pay; and the only factual issue was to determine the judges' gross salary as provided by Congress from time to time, against which the formula would be applied. Under the analysis given to us by the Court of Claims in *Friedman*, there is merit to the argument of the judges that these periodic deductions, which have

been ruled to have been unlawful, should be treated as a continuing claim.

The Government, in its Opposition to Appellants' Petition for Rehearing En banc, argues that the continuing claim doctrine does not apply since plaintiffs' claims are not inherently susceptible to being divided into a series of independent and distinct wrongs. This is because the continued withholding of these taxes from plaintiffs' judicial salaries "is simply the ongoing 'damages resulting from the single earlier alleged [constitutional] violation by the government.'" Opposition at 4, quoting *Brown Park Estates-Fairfield Dev. Co.* v. *United States*, 127 F.3d 1449, 1457 (Fed. Cir. 1997).

The Government relies heavily on *Brown Park*, as well as another recent case in this court, *Hart* v. *United States*, 910 F.2d 815 (Fed. Cir. 1990). *Brown Park* involved a suit by low-income housing providers against the Department of Housing and Urban Development ("HUD"), alleging breach of their housing assistance payments contract with HUD. The plaintiffs complained that HUD had failed to make rent adjustments in accordance with their contracts. Their main contention was that "HUD has breached its contracts with the Plaintiffs because, in the absence of any comparability studies, it failed to pay full rental adjustments based on the [Automatic Annual Adjustment Factor in the contracts]." *Brown Park* at 1453.

The question on appeal was whether plaintiffs could ward off the bar of the six year statute of limitations by relying on the continuing claim doctrine. This court cited the Court of Claims decision in *Friedman*, and pointed out the distinction drawn there between claims

which fall within the continuing claim doctrine, such as periodic pay claims, and claims which do not. *See id.* at 1456.

In describing the latter category, this court spoke in terms of "a single distinct event, which may have ill effects later on," as a wrong that does not qualify under the continuing claim doctrine. *Id.* Seizing upon that language, and the language above quoted, the Government argues that the imposition of the taxes at issue in 1983 and 1984 constituted such a single distinct event, even though the events continued to have ill effects over the years since.

But that language from *Brown Park* is simply descriptive of the type of case that falls outside the continuing claim doctrine. To determine whether a case falls inside or outside of that description, we return, as we must, to the governing considerations set out in *Friedman*, specifically, has Congress entrusted an administrative officer with the determination of the claimant's entitlement (in *Brown Park* Congress had so entrusted the determination to HUD); does the case involve significant factual determinations, or does it turn on pure issues of law or specific facts which the court is to decide for itself (in *Brown Park* the facts in dispute involved complex calculations of area market rents that were within the expertise of HUD); and does the case call upon the court to address broad concepts rather than resolve sharp and narrow factual issues (*Brown Park's* resolution turned on such issues as the "material differences between the rents charged for assisted and comparable unassisted units"). This court concluded, consistent with governing precedent, that *Brown Park* did not involve a continuing claim for

statute of limitations purposes; the case thus lends no support to the Government's case here.

Similarly, the other case on which the Government places heavy reliance, *Hart* v. *United States*, is inapposite. *Hart* involved a claim by the widow of a retired military member, in which she alleged that her deceased husband's election not to participate in the survivors benefit program was invalid because she had not been given notice as required by statute. She sued for annuity benefits, but filed her claim more than six years after her husband's death, the event under which her entitlement vested.

This court held that "[b]ecause all events necessary to her benefits claim had occurred when her husband died, we conclude that plaintiff's claim for . . . annuity benefits is not a 'continuing' claim." *Hart*, 910 F.2d at 818. Again, it is readily apparent that this was a case in which Congress has charged an administrative agency with making a determination whether she qualified for an annuity, and how much, and the case did not turn on an issue of law but on disputed facts as to whether and when she received notice. The court correctly discerned that under the *Friedman* precedent, this case fell over the line into the second category, that of non-continuing claim cases.

Neither *Brown Park* nor *Hart* questioned the authority of *Friedman*, nor could they, since neither was decided by this court en banc. We find the analysis provided by Judge Davis in the *Friedman* opinion to be a useful and effective mechanism for distinguishing between cases when the Government has failed to make a series of payments claimed to be due (or, as here, has deducted or withheld pay), and the question is whether

there is a seminal event that constitutes one cause of action, or whether each wrongful deduction or refusal to pay constitutes a separate cause of action. Statements such as "all necessary events had occurred," or "the claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs," may be accurate ways of describing the events after-the-fact, but they do not contribute to the analysis. The Government's reliance on such statements, rather than focusing on the *Friedman* factors, leaves us unpersuaded that the Government's view should prevail. We conclude that, for the reasons stated above, the case before us falls comfortably on the side of the line governed by the continuing claim doctrine.

CONCLUSION

The judgment of the trial court with regard to the application of the statute of limitations issue must be, and is, reversed. The matter is remanded to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX B

UNITED STATES CLAIMS COURT

No. 705-89 C

TERRY J. HATTER, JR., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: Nov. 9, 1990]

OPINION AND ORDER

TURNER, Judge.

Plaintiffs are ten Article III* federal judges serving on various United States district courts and on one United States court of appeals. They bring this action pursuant to U.S. Const. art. III, § 1 (Compensation Clause) claiming that their compensation has been diminished by reason of the Social Security Amendments of 1983, Pub. L. 98-21, § 101, 97 Stat. 65, 68 (codified as

* The designation stems from Article III, Section 1, of the United States Constitution which provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, *receive or their Services a Compensation, which shall not be diminished during their Continuance in Office.* [Emphasis added.]

amended in scattered sections of 26 U.S.C. and 42 U.S.C.). Plaintiffs seek damages in the amount of the Social Security taxes withheld from their salaries from January 1, 1984 to the present.

Defendant filed a motion to dismiss the complaint pursuant, *inter alia*, to RUSCC 12(b)(1). It alleges that this a tax refund suit over which the Claims Court currently lacks subject matter jurisdiction because the plaintiffs failed to file an administrative claim for refund with the Internal Revenue Service as required by 26 U.S.C. § 7422(a). Hearing concerning defendant's motion was conducted on November 9, 1990 in Washington, D.C.

For reasons stated below, we conclude that the Claims Court lacks subject matter jurisdiction over the complaint at this time. Although plaintiffs characterize their claims as ones for damages other than a tax refund, we conclude that, in essence, their claims are for tax refunds which much be brought first before the IRS. 26 U.S.C. § 7422(a).

I

Prior to January 1, 1984, the salaries of Article III judges were not subject to withholding for Social Security taxes. Effective January 1, 1984, Congress amended the Social Security Act, 42 U.S.C. § 401(a)(5)(E) (1988), and the Internal Revenue Code of 1954, 26 U.S.C. § 3121(b)(5)(E) (1988), extending Social Security coverage to many previously exempt civilian government employees, including judges of the United States district courts and courts of appeals. Pursuant to this statute, the plaintiffs in this case had the

following amounts withheld from their salaries during the years 1984 through 1989:

Year	*Amount Withheld*
1984	$2,532.60
1985	$2,791.80
1986	$3,003.00
1987	$3,131.70
1988	$3,379.50
1989	$3,604.80

All of the plaintiffs were appointed and took office prior to January 1, 1984, the effective date of the amendments. At the time of their respective appointments, the only mandatory deductions from their salaries were for federal and state income taxes. No mandatory deductions were made for retirement or for Social Security benefits. Plaintiffs now seek to recover as damages the amounts withheld for Social Security taxes.

II

Title 26 U.S.C. § 7422(a) provides in pertinent part:

> *No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof. [Emphasis added.]*

Plaintiffs concede that if the court determines that their claims are for tax refunds, then they must file an administrative refund claim with the IRS before suit may be brought in this court. *See* 26 U.S.C. § 7422(a). They argue, however, that this is not a tax refund suit but rather a claim for damages based on the diminution in compensation caused by withholding the Social Security tax from their salaries. To support their position, plaintiffs rely on the Court of Claims opinion in *Atkins* v. *United States*, 556 F.2d 1028, 214 Ct. Cl. 196 (1977), *cert. denied*, 434 U.S. 1009, 98 S. Ct. 718, 54 L.Ed. 751 (1978). They argue that since, according to *Atkins*, the court would have great flexibility in fashioning a remedy for a violation of the Compensation Clause, their claim is somehow distinguished from an ordinary tax refund suit. Plaintiffs argue that the court could provide a remedy by awarding damages or by ordering an appropriate increase in their salaries to counteract the effect of the Social Security deductions. The possibility of alternative relief, according to plaintiffs, demonstrates that defendant's characterization of their claim as one for a tax refund is mistaken.

Defendant argues that this is a tax refund suit, relying primarily on the Court of Claims opinion in *King* v. *United States*, 390 F.2d 894, 896, 182 Ct. Cl. 631, 633-34 (1968), *rev'd on other grounds*, 395 U.S. 1, 2, 89 S. Ct. 1501, 1501-02, 23 L.Ed.2d 52 (1969). In *King*, the plaintiff was a retired Army colonel who claimed that by misclassifying his armed services retirement status, the government caused him to pay federal income taxes

which he was not legally obligated to pay. King asserted that he should be allowed to maintain his claim even though he had not filed a refund claim with the IRS. The Court of Claims held that this monetary claim was barred because he did not file an administrative refund claim but granted him relief in the form of a declaratory judgment and was later reversed on this ground. 395 U.S. at 5, 89 S. Ct. at 1503.

Although *King* did not involve a diminution claim based on the Compensation Clause, we conclude that it is more analogous to the present case than *Atkins*. Plaintiffs attempt to distinguish their case from *King* on the ground that, unlike *King*, they do not challenge the government's authority to deduct Social Security contributions from their wages. Plaintiffs argue that if they are legally obligated to pay the Social Security taxes, then the diminution which results must be rectified. Putting aside semantics, we find that this is a tax refund suit. Like the plaintiff in *King*, plaintiffs here are asserting that they should be allowed to maintain their claim in this court even though they have not filled a refund claim with the IRS. For jurisdictional purposes, plaintiffs' position is identical to the plaintiff in *King* and we find it controlling.

The fact that the plaintiffs in *Atkins* brought a claim for damages is of no help to the plaintiffs in this case. The claim in *Atkins* was for a violation of the Compensation Clause based on alleged diminution in salary caused by inflation and by the failure of Congress to raise judicial salaries. Since *Atkins* did not involve alleged diminution by taxation, it did not present a jurisdictional problem for the court similar to the one addressed in *King*.

The issue of whether taxes withheld from Article III judicial salaries constitute a diminution in violation of the Compensation Clause is not new. It was first brought before the United States Supreme Court in 1920 in a case involving income taxes. *Evans* v. *Gore*, 253 U.S. 245, 40 S. Ct. 550, 64 L.Ed. 887 (1920). Thereafter, each time the "diminution" issue has arisen in the context of income taxes, the claim originated as one against the IRS. *See Miles* v. *Graham*, 268 U.S. 501, 45 S. Ct. 601, 69 L.Ed. 1067 (1925), *overruled by O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939). In *O'Malley*, the Supreme Court described the suit below as "an action at law to recover a tax on income claimed to have been illegally exacted." 307 U.S. at 278, 59 S. Ct. at 838. The Court further noted that the suit had been brought against the Collector of Internal Revenue and the plaintiff's claim for refund had been rejected. 307 U.S. at 279, 59 S. Ct. at 838-39.

None of the claims for violation of the Compensation Clause brought after *O'Malley* was based on taxes. *See United States* v. *Will*, 449 U.S. 200, 101 S. Ct. 471, 66 L.Ed.2d 392 (1980); *Duplantier* v. *United States*, 606 F.2d 654 (5th Cir. 1979), *cert. denied*, 449 U.S. 1076, 101 S. Ct. 854, 66 L.Ed.2d 798 (1981); *Atkins* v. *United States*, 556 F.2d 1028, 214 Ct. Cl. 186 (1977), *cert. denied*, 434 U.S. 1009, 98 S. Ct. 718, 54 L.Ed.2d 751 (1978).

We conclude that there is no logical reason to view a claim for diminution based on Social Security taxes differently from one based on income taxes. In order to obtain a refund of either, the claim must be brought before the IRS prior to filing a complaint in this court. Manifestly, however, artfully characterized, plaintiffs

seek recovery of Social Security taxes which have been deducted from their salaries since January 1, 1984. Based on the Supreme Court's interpretation of diminution claims involving income taxes as claims for a tax refund rather than damages, the Court of Claims opinion in *King*, and the face of 26 U.S.C. § 7422(a), we conclude that plaintiffs' claims are for tax refunds over which this court lacks subject matter jurisdiction at this time.

III

Defendant's motion to dismiss filed on May 15, 1990, to the extent that it asserts this court's current lack of jurisdiction, *see* RUSCC 12(b)(1), is GRANTED. It is ORDERED that judgment be entered dismissing the complaint for lack of jurisdiction.

Each party shall bear its own costs. *See Johns-Manville Corp.* v. *United States*, 893 F.2d 324, 328 (Fed. Cir. 1989) ("the Claims Court has no power to award costs in cases over which is has no . . . jurisdiction").

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 91-5039

JUDGE TERRY J. HATTER, JR., JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON JUDGE RAUL A. RAMIREZ AND CHIEF JUDGE THOMAS A. WISEMAN, JR., PLAINTIFFS-APPELLANTS

v.

THE UNITED STATES, DEFENDANT-APPELLEE

[Filed: Jan. 16, 1992]

Before: ARCHER, PLAGER and RADER, Circuit Judges.

RADER, Circuit Judge.

Terry J. Hatter, Jr., et al., life-tenured federal judges, appeal the dismissal of their complaint by the United States Claims Court. *Hatter* v. *United States*, 21 Cl. Ct. 786 (1990). The judges allege that imposition of social security taxes diminished their compensation in violation of the United States Constitution. The Claims Court dismissed their complaint for lack of jurisdiction. Because the Tucker Act gives the Claims Court jurisdiction over claims of salary diminution under Article III of the Constitution, this court reverses and remands.

BACKGROUND

In 1983, Congress passed the Social Security Amendments of 1983. *See* 42 U.S.C. § 410(a)(5)(C)-(G) (1988). This Act extended social security coverage to many Government employees, including federal court of appeals and district court judges.* Previously, federal judges were exempt from paying social security taxes.

On January 1, 1984, the Social Security Amendments imposed Federal Insurance Contributions Act ("FICA") taxes on federal judges. From 1984 to 1989, plaintiffs each paid the following amounts in FICA taxes:

YEAR	TAX
1984	$2,532.60
1985	$2,791.80
1986	$3,003.00
1987	$3,131.70
1988	$3,379.50
1989	$3,604.80

On December 29, 1989, plaintiffs filed a complaint in the Claims Court. In count I, plaintiffs contend that the 1983 Amendments "unlawfully diminished and continues to diminish plaintiffs' compensation in violation of Article III, Section 1, of the Constitution of the

* No member of this panel was an Article III judge in 1984. Therefore, no panel member suffered an alleged diminution in salary when the 1983 Amendments took effect.

United States." Under this count, plaintiffs sought monetary damages to compensate for their diminished wages. Count II claims that plaintiffs have an employment contract with the Government which protects them against diminishment of their compensation. Again, plaintiffs seek damages for breach of contract.

The Government moved to dismiss the complaint for lack of jurisdiction because plaintiffs did not file an administrative claim for a tax refund. *See* 26 U.S.C. § 7422(a) (1988). The Claims Court granted the Government's motion. Plaintiffs appealed.

DISCUSSION

This court must decide whether appellants have stated a case within the Claims Court's jurisdiction under 28 U.S.C. § 1491 (1988) (Tucker Act). Under the Tucker Act, the United States has waived sovereign immunity for suits in the Claims Court:

> The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1).

The Tucker Act alone, however, does not create a substantive right to collect money damages from the United States. *United States* v. *Testan*, 424 U.S. 392, 398, 96 S. Ct. 948, 953, 47 L.Ed.2d 114 (1976); *Eastport*

S.S. v. *United States*, 372 F.2d 1002, 1007-1009, 178 Ct. Cl. 599 (1967). Rather, the Act empowers the Claims Court to award damages for the violation of substantive rights embodied in the Constitution, federal statutes, executive regulations, or federal contracts. *United States* v. *Mitchell*, 463 U.S. 206, 216-17, 103 S. Ct. 2961, 2967-68, 77 L.Ed.2d 580 (1983).

Thus, to invoke Tucker Act jurisdiction, claimants must show that their claim arises under an independent source of federal law. Moreover, the federal law or contract, fairly interpreted, must provide a damages remedy for violations. *Id.* In sum, appellants must show their claim arises from a federal constitutional, statutory, regulatory, or contractual provision that provides damages its breach.

Appellants base their Tucker Act claim on Article III, Section 1, of the United States Constitution:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. art. III, § 1. Appellants thus invoke the Constitution as an independent source of federal law providing for the payment of money.

This provision of the Constitution, fairly interpreted, mandates the payment of money in the event of a prohibited compensation diminution. This provision states, in mandatory and unconditional terms, that judges' salaries "shall not be diminished during their Continuance in Office." This language presupposes damages

as the remedy for a governmental act violating the compensation clause. Only a timely restoration of lost compensation would prevent violation of the Constitution's prohibition against diminution of judicial salaries.

Thus, the Constitution mandates that federal judges must receive, "during their Continuance in Office," compensation for their services which may not be less than their compensation upon assuming office. In the event of a violation of this clause, the Constitution itself provides a remedy—compensation. In sum, by forbidding any diminution of judicial compensation, the Constitution itself requires repayment of prohibited reductions in compensation to Article III judicial officers.

The history of the compensation clause supports this court's reading that a violation of the clause mandates repayment or compensatory damages. According to James Madison's notes, the delegates to the Philadephia Convention discussed the compensation clause on July 18, 1787. 2 Max Farrand, *The Records of the Federal Convention of 1787*, 44-45 (1911). Gouverneur Morris proposed wording the compensation clause to prevent "any improper dependence in the Judges." *Id.* James Madison, in response, shared Morris's view that the Constitution should reduce any dependence by the judicial branch on the other branches for compensation. *Id.* at 45. Alexander Hamilton, too, explained the compensation clause:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support . . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.* And we can never hope to see realized in

> practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter.

The Federalist No. 79, at 472 (Alexander Hamilton) (emphasis in original) (Clinton Rossiter ed., 1961). These framers of the Constitution shared a common vision of the undiminishable compensation clause.

These observations by the framers of the compensation clause underscore its importance to the preservation of judicial independence in a system of separated powers. These comments also suggest that judicial officers deprived of full compensation need not rely on legislative or executive action for a remedy. To require further legislative or executive actions to enforce the compensation clause would frustrate Article III's purpose of judicial independence. The purpose of Article III, § 1, as well as its language, embraces a self-executing compensatory remedy.

The Supreme Court has also considered whether an alleged violation of the compensation clause provides Tucker Act jurisdiction. *United States* v. *Will*, 449 U.S. 200, 101 S. Ct. 471, 66 L.Ed.2d 392 (1980). In *Will*, several federal judges sought review of four statutes purporting to stop or reduce cost-of-living increases for judges. The Court concluded that two of the four statutes purported to roll back judicial salary increases already in effect. These statutes violated Article III, § 1. *Id.* at 226, 230, 101 S. Ct. at 486, 488. Any legislative attempt to rescind those effective salary increases would diminish judges' compensation. The Court upheld the other two statutes because they affected salary increases not yet in effect. *Id.* at 229,

101 S. Ct. at 487. Therefore, those two statutes did not diminish judicial salaries. The case was remanded to the trial court to determine money damages. *Id.* at 230-31, 101 S. Ct. at 488.

To reach these substantive results, the Court necessarily examined the jurisdiction of the trial courts to enforce the compensation clause. The Court stated that both the Court of Claims, the predecessor to the Claims Court's trial jurisdiction, and district courts had jurisdiction to determine whether the four statutes violated Article III, § 1. The Court stated:

> [T]here is no doubt whatever as to this Court's jurisdiction under 28 U.S.C. § 1252 or that of the District Court under 28 U.S.C. § 1346(a)(2) (1976 ed., Supp. III).

Id. at 210-11, 101 S. Ct. at 478 (footnote omitted). "Jurisdiction being clear," *id.* at 211, 101 S. Ct. at 479, the Court proceeded to the next inquiry.

The Court felt jurisdiction was "clear" based on 28 U.S.C. § 1346(a)(2). In a footnote, the Court explained:

> This provision confers on the district courts and the Court of Claims concurrent jurisdiction over actions against the United States based on the Constitution when the amount in controversy does not exceed $10,000.

Id. at 211, n. 10, 101 S. Ct. at 478, n. 10. Section 1346(a)(2) of title 28, also known as the Little Tucker Act, mirrors the Tucker Act. It provides district courts concurrent jurisdiction with the Claims Court to handle claims against the United States, "not exceeding

$10,000 in amount, founded either upon the Constitution, or any Act of Congress." The Supreme Court found jurisdiction in the district court for the *Will* plaintiffs under the Little Tucker Act.

The only jurisdictional difference between the appellants in *Will* and the plaintiffs in this case is the amount in controversy. Plaintiffs in this case seek more than $10,000 in damages. The Supreme Court found jurisdiction under the Little Tucker Act in the district court for the *Will* plaintiffs. The Tucker Act provides jurisdiction in the Claims Court for the plaintiffs in this case.

The Claims Court erred by recharacterizing plaintiffs' action as solely a request for a tax refund. Plaintiffs' complaint sought damages for violation of the compensation clause. Nonetheless, the Claims Court read their claim as a tax refund suit. The Claims Court erred by imposing a single legal theory on the plaintiffs' complaint.

The Federal Rules of Civil Procedure permit parties to pursue their claim on any viable legal theory. Fed. R. Civ. P. 8(e)(2). In this case, plaintiffs could have pursued a tax refund. If they had, as the Claims Court noted, title 26 would have required a prior administrative claim. *See*, 26 U.S.C. § 7422(a). Plaintiffs, however, did not pursue a tax refund. Instead they sought damages for violation of Article III, § 1—an action which is within the Tucker Act jurisdiction of the Claims Court.

By requiring prior filing of an administrative claim with the Internal Revenue Service for a compensation clause violation, the Claims Court overlooked the language and purpose of Article III, § 1. Conditioning redress of an alleged compensation clause breach on executive branch actions would frustrate the purpose of Article III, § 1. The Constitution provides a compensatory remedy without need for reliance on other branches.

The Claims Court based its recharacterization of plaintiffs' action on two cases, *O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939), and *King* v. *United States*, 390 F.2d 894, 182 Ct. Cl. 631 (1968), *rev'd on other grounds*, 395 U.S. 1, 89 S. Ct. 1501, 23 L.Ed.2d 52 (1969). In *O'Malley*, the plaintiffs challenged the validity of federal income taxes because withholding revenues allegedly diminished federal judges' salaries. The Court determined that Article III did not bar Congress from imposing a non-discriminatory income tax on federal judges. *O'Malley*, 307 U.S. at 282, 59 S. Ct. at 840. *O'Malley*, however, does not affect the jurisdiction of the Claims Court. Contrary to the Claims Court's statement, *Hatter*, 21 Cl. Ct. at 789, the Supreme Court did not recast *O'Malley's* plaintiffs' diminution claims as tax refund actions. The *O'Malley* plaintiffs elected to sue the Collector of Internal Revenue for a refund, rather than seeking damages. The *O'Malley* plaintiffs' election in the 1930s, however, hardly binds the *Hatter* plaintiffs in the 1990s. As noted earlier, the Tucker Act provides plaintiffs an independent action for damages based on a purported violation of Article III, § 1.

By improperly recharacterizing plaintiffs' action, the Claims Court also foreclosed an issue to be determined on the merits. *O'Malley* determined that federal income taxes do not have a discriminatory impact on

federal judges. Plaintiffs have had no opportunity to demonstrate whether the social security tax is discriminatory. The Claims Court erred in foreclosing this issue without full consideration of the merits. On remand, the Claims Court will have an opportunity to examine whether social security taxes have a discriminatory effect on federal judges.

The Claims Court also erred in viewing *King* as identical to this case for jurisdictional purposes. *Hatter*, 21 Cl. Ct. at 788. King was an Army Colonel who claimed that he had paid too much federal income tax because the Government misclassified his retirement status. The Court of Claims dismissed Colonel King's tax refund claim for failure to file a prior administrative claim with the Internal Revenue Service. *King*, 390 F.2d at 896. In equating the *Hatter* plaintiffs with Colonel King, the Claims Court overlooked pertinent distinctions.

First, plaintiffs in this case have an independent jurisdictional basis for their claim. Colonel King had no choice except to seek a tax refund. Second, unlike Colonel King, plaintiffs here do not challenge the United States' authority to impose a tax. Plaintiffs merely seek compensation to ensure that imposition of a tax does not diminish their salary. In sum, plaintiffs do not seek tax refunds, but compensation to ensure compliance with Article III, § 1. The Tucker Act provides the Claims Court jurisdiction to adjudicate this action.

CONCLUSION

Appellants' claim for relief states a claim within the jurisdiction of the Claims Court. Therefore, the decision of the Claims Court is reversed and this case is remanded for a hearing on the merits.

REVERSED AND REMANDED.

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

No. 705-89 C

JUDGE TERRY J. HATTER, JR., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

[Filed: June 22, 1994]

OPINION AND ORDER

TURNER, Judge.

This opinion addresses plaintiffs' motion for summary judgment filed September 2, 1993 and defendant's cross-motion for summary judgment filed October 1, 1993. Oral argument was heard on November 16, 1993. The parties agree that there are no material disputed facts. We conclude that defendant's cross-motion should be granted.

I

Plaintiffs are federal district and circuit court judges who took office prior to January 1, 1983. On that date, all federal judges for the first time became subject to the Hospital Insurance (Medicare) portion of the Social Security tax. Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, § 278(a) 96 Stat. 324, 559 (1982) (codified as amended at 26 U.S.C. (I.R.C.) § 3121(u)

(1988)). One year later, judges became subject to the Old Age Survivors and Disability Insurance portion of the Social Security tax, and since January 1, 1984, all federal judges have been fully subject to Social Security taxes. Social Security Amendments of 1983, Pub. L. No. 98-21, § 101(a)(1), (b)(1) and (d), 97 Stat. 65, 68, 69 (codified as amended at 26 U.S.C. (I.R.C.) § 3121(b)(5)(E) (1988) and 42 U.S.C. § 410(a)(5)(E) (1988)). Social Security taxes have therefore been duly withheld from plaintiffs' monthly compensation since the effective dates of these acts.

Plaintiffs all serve pursuant to Article III of the Constitution, which in pertinent part provides that federal judges "shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1 (hereafter the "Compensation Clause").

Plaintiffs contend that because they were already judges when the withholding of Social Security taxes from their pay began, their compensation was diminished in violation of the Compensation Clause. In the alternative, plaintiffs claim a contract right to undiminished compensation. Plaintiffs seek a refund of all Social Security taxes collected thus far.

After a review of Compensation Clause law in part II, we consider plaintiffs' four main constitutional arguments in part III, and then address plaintiffs' contract claim in part IV.

II

A

An income tax on judges was first imposed in 1862 and was collected for several years. Act of July 1, 1862, ch. 119, § 86, 12 Stat. 432, 472 (1862). This law occasioned the Supreme Court's first pronouncement on the constitutionality of taxing judges. It came as an extraordinary 1863 protest against the tax issued in the form of a letter from Chief Justice Taney to the Treasury Secretary. This remarkable document, officially recorded and published by the Court[1] and resembling nothing so much as an unsolicited advisory opinion, was echoed several years later by an opinion from the Attorney General that the income tax was unconstitutional as applied to judges. 13 Op.A.G. 161 (1869). As a consequence, all taxes which had been collected on judicial compensation were refunded in 1873. *Wayne* v. *United States*, 26 Ct. Cl. 274, 290, 1800 WL 1765 (1891). But these two seemingly non-binding opinions had an even more powerful effect: the courts came to consider the matter of judicial taxation closed without ever actually addressing the issue. *E.g.*, *Wayne*, 26 Ct. Cl. at 290.

The courts finally addressed the matter when, subsequent to ratification of the 16th Amendment in 1913,[2]

---

[1] The letter is found at 157 U.S. 701. There was a 22-year lapse between the 1863 order of the Court recording the letter and its publication.

[2] "The Congress shall have power to lay and collect taxes on incomes, *from whatever source derived*, without apportionment among the several states, and without regard to any census or enumeration." U.S. Const. amend. XVI (emphasis added).

Congress in 1919 made its second serious attempt to tax federal judges. Revenue Act of 1918, ch. 18, § 213, 40 Stat. 1057, 1065 (1919). Thus the first Compensation Clause case of precedential significance does not appear until *Evans* v. *Gore*, 253 U.S. 245, 40 S. Ct. 550, 64 L.Ed. 887 (1920). In *Evans*, a federal judge who had taken office in 1899 challenged the Revenue Act of 1918, arguing that the income tax was an unconstitutional diminution of his salary.

Over a vigorous dissent by Justice Holmes, joined by Justice Brandeis, the Court agreed with the plaintiff judge, holding that an income tax on judges was an impermissible diminution in compensation, and that the Compensation Clause continued to prohibit taxation of judicial salaries even after the 16th Amendment. Holmes's position in dissent, since adopted by the Court as will be seen, was that an income tax on judges would be valid so long as it did not single out judicial compensation but rather applied with like force to the income of all citizens. 253 U.S. at 264-267, 40 S. Ct. at 557-558.

The taxing authorities refused to give in so easily. In *Miles* v. *Graham*, 268 U.S. 501, 45 S. Ct. 601, 69 L.Ed. 1067 (1925), the government sought to limit the *Evans* rule, arguing that the tax protection of the Compensation Clause shielded only judges appointed before the tax became law (hereafter "prior judges").[3] According to the government, prior judges stood in contrast to judges taking office after the tax (hereafter "new judges"): taxation would not diminish the compensation

---

[3] Plaintiffs here are all prior judges, since they took office before the Social Security tax extended to the judiciary.

of new judges, since they would never have received their salary untaxed. In *Miles*, the plaintiff was a new judge who argued, in essence, that the Compensation Clause's protection extended to judicial compensation as an entity or institution, without regard to whether the recipient judge took office before or after enactment of the tax.

The Court in *Miles* agreed with the plaintiff, firmly rejecting the government's attempt to limit the *Evans* tax exemption to prior judges. (Brandeis, but not Holmes, dissented without comment.) Relying heavily on *Evans*, *Miles* made explicit the simple rule inferable from *Evans*: under the constitution, all judicial compensation provided for by Congress was tax-free. 268 U.S. at 509, 45 S. Ct. at 602.

In a familiar pattern, it was not long before the initially rejected Holmes-Brandeis formulation (calling for judicial salary to be treated the same for tax purposes as income earned by any citizen) was, in effect, adopted by the Court. This development came after Congress in 1932 made its third attempt to tax the judiciary, imposing another income tax limited to new judges. Revenue Act of 1932, ch. 209, § 22(a), 47 Stat. 169, 178 (1932). Predictably, a new judge challenged this tax based on the rule of *Miles*. *O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939) (Frankfurter, J.).

For the tax collectors, the third time proved the charm: the Court reversed course, issuing its first rejection of a judge's Compensation Clause challenge to a tax. The Court held that judicial compensation could be taxed, approving Congress's "position that a nondiscriminatory tax laid generally on net income is

not . . . a diminution [of a federal judge's] salary within the prohibition" of the Compensation Clause. 307 U.S. at 282, 59 S. Ct. at 840. According to the Court, the constitution did not excuse judges from the obligations of citizenship. *Id.* *O'Malley* left *Miles* effectively overruled.[4]

Justice Frankfurter in *O'Malley* also sharply criticized *Evans*, but in a characteristic exercise of judicial restraint was careful to note that only the question of tax immunity for new judges was properly at bar, whereas the plaintiff in *Evans* had been a prior judge. *O'Malley*, 307 U.S. at 281-82, 59 S. Ct. at 839-40. As will be seen, *O'Malley* remains the most important precedent in the area of taxation of federal judges.

A generation after *O'Malley*, the Court of Claims[5] thoroughly reviewed Compensation Clause law in *Atkins* v. *United States*, 214 Ct. Cl. 186, 556 F.2d 1028 (1977) (en banc), *cert. denied*, 434 U.S. 1009, 98 S. Ct. 718, 54 L.Ed.2d 751 (1978). This review was occasioned by the suit of a group of federal judges who claimed that their compensation, though nominally unchanged

---

[4] The court's language is to some degree unclear as to the fate of *Miles*: "But to the extent that what the Court now says is inconsistent with what was said in *Miles* v. *Graham*, 268 U.S. 501, 45 S. Ct. 601, the latter cannot survive." 307 U.S. at 282-83, 59 S. Ct. at 840.

[5] In 1982 the Court of Claims and the Court of Customs and Patent Appeals were abolished. Judges of those two courts became judges on the new Court of Appeals for the Federal Circuit. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, tit. I, § 165, 96 Stat. 25, 50 (1982) (codified as amended at 28 U.S.C. § 44 (1988)). Court of Claims decisions constitute precedent for this court to the same extent as decisions of the Federal Circuit. *South Corp.* v. *United States*, 690 F.2d 1368 (Fed. Cir. 1982).

since 1969, had in fact been unconstitutionally eroded by inflation. In rejecting this claim, the Court of Claims gave valuable guidance on the import of *O'Malley* and its predecessors.

In analyzing the Supreme Court's holding in *O'Malley*, the Court of Claims in Atkins stated that both *Evans* and *Miles* are "no longer good law," *id.*, 214 Ct. Cl. at 213, 556 F.2d at 1043. According to the Court of Claims, *O'Malley* "overruled *Miles*, and by force of reasoning overruled a good deal of *Evans*," *id.* at 215, 556 F.2d at 1044.[6]

Atkins fleshes out the distinction between indirect and direct diminution first alluded to by the Supreme Court in *Evans*, 253 U.S. at 254, 40 S. Ct. at 553. A direct diminution is a reduction in the number of dollars authorized by Congress for a judge's salary, while an indirect reduction, for instance "by virtue of a tax," lowers the take-home pay of a judge but not the statutory salary. *Atkins*, 214 Ct. Cl. at 215, 556 F.2d at 1044. Given that "the purpose of the Compensation Clause is to preclude a financially based attack on judicial independence," *id.* at 222, 556 F.2d at 1048, cases of indirect diminution are to be handled differently from cases of direct diminution. The Court of Claims explained that while the Supreme Court's Compensation Clause cases uniformly agreed that direct diminutions were always prohibited, after *O'Malley* "[i]ndirect, nondiscriminatory diminishments [like taxes] . . . which do not amount to an assault on the

[6] Also interesting in this regard is Justice Butler's dissent in *O'Malley* itself, which states that the majority in *O'Malley* "intend [ed] to destroy the decision in *Evans* v. *Gore*." 307 U.S. at 297, 59 S. Ct. at 846.

independence of the third branch . . . [are not prohibited by] the Compensation Clause," *id.* at 216, 556 F.2d at 1045.

The 1977 *Atkins* decision is in full accord with the later Supreme Court Compensation Clause case of *United States* v. *Will*, 449 U.S. 200, 101 S. Ct. 471, 66 L.Ed.2d 392 (1980), which dealt with a direct diminution. In *Will*, scheduled increases in judicial, congressional, and top-level executive pay were withdrawn for four years running, twice just before the raises took hold, and twice just after. Upon a suit by federal judges, the Court held that while the political branches may cancel a prospective judicial salary increase, any increase allowed to become effective even for less than a day is permanent for Article III judges. 449 U.S. at 224-26, 101 S. Ct. at 485-486.

The *Will* decision buttresses the implication of the Court of Claims in *Atkins* that all direct reductions of judicial compensation are invalid regardless of congressional intent: speaking of direct diminutions, the Court said "the Constitution makes no exceptions for 'nondiscriminatory' reductions." 449 U.S. at 226, 101 S. Ct. at 486. As to indirect diminutions, not at issue in *Will*, the Court was not quite so clear. Still, *Will* gives some guidance on indirect diminutions like taxes: the Court discussed *O'Malley* with apparent approval, noting that *O'Malley* validated income taxation of judicial salaries and "recognized that the Compensation Clause does not forbid everything that might adversely affect [the finances of] judges." *Id.* at 227 n.31, 101 S. Ct. at 486 n. 31. In fact, *Will* may have left open the possibility that even a congressional intent to pressure the judiciary might not invalidate an indirect diminution: "[w]e need

not address the question of whether evidence of an intent to influence the Judiciary would invalidate a statute that on its face does not directly reduce judicial compensation." *Id.* at 226 n. 30, 101 S. Ct. at 486 n. 30.[7] Of course, in the absence of facts showing bad legislative intent, this legal question is moot. *Atkins*, 214 Ct. Cl. at 216, 228, 235, 556 F.2d at 1045, 1051, 1055.

B

The following two rules and one corollary emerge from the foregoing review of the Compensation Clause case law.[8] First, direct diminution of the salary authorized for federal judges is absolutely forbidden, no matter how innocent the intent of Congress is. Second, so-called indirect diminishments, and specifically income taxes, are permissible even if they result in a reduction in take-home pay for federal judges, at least so long as they are not part of an assault on judicial independence. This rule's corollary is that if there is no evidence of legislative intent to influence the judiciary,

[7] The Court of Claims, albeit also in *dicta*, took a firmer stand on this issue, indicating that an indirect diminution which discriminated against judges would be remediable by the courts. *Atkins*, 214 Ct. Cl. at 222-23, 556 F.2d at 1048.

[8] *Atkins* as it applies to this case is primarily *dicta*, since *Atkins* dealt with the impact of inflation on judicial buying power rather than with an impact caused by congressional action. *Will* is likewise not on all fours here, dealing as it does with a direct diminution rather than a tax. *O'Malley*, however, is almost directly on point, with the only arguable distinction being that it does not overtly deal with the problem of taxation of prior judges. Still, as we demonstrate, the dicta from *Atkins* and *Will*, read together with the all-important holding in *O'Malley*, form a consistent and common-sensical body of law governing the instant case.

taxes of general applicability are valid as to Article III judges.

Thus the question in this case is not whether the plaintiffs' compensation has been reduced by Social Security taxes, for at least in terms of take-home pay it has been, but rather whether this indirect reduction is of the type forbidden by the Compensation Clause.[9] As will be shown below, under *O'Malley* and subsequent cases, the answer is no.

III

As to the Compensation Clause claims, (Second Am.Cplt. Counts I-II at 7-8), four basic themes, some of them related, emerge from plaintiffs' briefs and oral argument. First, plaintiffs contend that in overruling *Miles* but not *Evans*, the Supreme Court meant to limit the original broad holding of *Evans* to the following still vital rule: "[E]ven a tax of general applicability cannot be imposed upon [prior] judges who were appointed

[9] For the purpose of resolving the motions at bar, we accept plaintiffs' assumption that inclusion in Social Security represents a reduction in judicial pay. But this proposition is by no means settled. If plaintiffs were to prevail in this litigation, and all affected judges were effectively taken out of Social Security and refunded their Social Security taxes, Compensation Clause claims by judges who felt their compensation had been decreased would surely result. For instance, though plaintiffs here claim Social Security coverage *reduces* their compensation, in *Robinson* v. *Sullivan*, 905 F.2d 1199 (8th Cir. 1990) (Wollman, J.), a senior judge who was retroactively denied Social Security credit for service during a brief window of Social Security coverage for senior judges challenged the denial as a Compensation Clause diminution. This argument was rejected on the grounds that his temporary coverage under Social Security was "not a direct *increase*" in compensation. 905 F.2d at 1202 (emphasis added).

. . . before the tax became law." Pl. Br. at 29. To some extent linked with this reading of *Evans* is plaintiffs' second contention that no taxation of judges is permissible if it makes judicial service relatively less attractive than it was when a judge took office. Pl. Br. at 20-21; Pl. Reply at 12-13. Plaintiffs' third argument is that the Social Security tax at issue here is not even an income tax of general applicability such as was permitted to be laid on judges by *O'Malley*. Pl. Br. at 25-26; Pl. Reply at 25-26; Tr. 15-16. Somewhat related to this argument is plaintiffs' last main point: that the scheme designed to bring federal employees under Social Security coverage discriminated against the plaintiff judges compared to other federal workers. Pl. Br. at 37-8, 40, 43; Tr. at 16-17, 19, 72-74. We discuss these four themes in turn.

A

Plaintiffs' first contention is that the factually similar *Evans* case (discussed above in part II-A) controls here, and thus that new taxes cannot be imposed on prior judges even if all other citizens are included in the new tax. Pl. Br. at 28-29. While it is true that the Supreme Court has never expressly overruled *Evans*, subsequent Court of Claims and Supreme Court cases convince us it would be irresponsible to dispose of this controversy on that ground. The Supreme Court itself long ago criticized the *Evans* case, *O'Malley*, 307 U.S. at 280-82, 59 S. Ct. at 839-40 (1939), and more recently confirmed that *Evans* has been "undermine[d]," *Will*, 449 U.S. at 227 n. 31, 101 S. Ct. at 486 n. 31. Additionally in *Will*, the Supreme Court reversed a trial judge who expressly relied on *Evans*, albeit in a factually

distinguishable case. *Will*, 449 U.S. at 227, 101 S. Ct. at 486-487.

Such negative Supreme Court guidance certainly discourages automatic reliance on *Evans*. But in addition, the *Will* and *O'Malley* decisions at the very least strongly suggest that a tax or other statute which indirectly reduces judicial pay is permissible absent evidence of a congressional intent to influence the judiciary. *Will*, 449 U.S. at 226-27 & nn.30-31, 101 S. Ct. at 486-87 & nn.30-31; *O'Malley*, 307 U.S. at 282, 59 S. Ct. at 840. Moreover, the Court of Claims stated that the Supreme Court has effectively overruled *Evans* "*at least* as regards [new] judges," *Atkins*, 214 Ct. Cl. at 215, 556 F.2d at 1044 (emphasis added).

Even in the face of this negative treatment, plaintiffs persist in their claim that though the broad rationale of *Evans* has certainly been narrowed by subsequent case law, the fact that *Evans* has never been expressly overruled means that some part of the holding survives. Pl. Br. at 28. According to plaintiffs, the surviving rule of *Evans* is that under the Compensation Clause, prior judges have more tax protection than new judges: you can't charge a prior judge new taxes. Pl. Br. at 28-29. Adopting this distinction between new and prior judges would require us to read much into *Evans*, because that case nowhere suggested such a difference. In fact the Court in *Evans* broadly defined the issue in that case as the taxability of the "compensation of federal judges *in general*," 253 U.S. at 247, 40 S. Ct. at 551 (emphasis added). We understand that the distinction between prior and new judges was arguably drawn by omission in *O'Malley* when the Court expressly limited its holding to new judges. 307 U.S. at 281-82, 59 S. Ct. at

839-40. But unlike the Court in *O'Malley*, here we are squarely addressed with the question of whether new judges have less tax protection than prior ones under the constitution. *O'Malley's* failure to expressly address the propriety of new taxes on prior judges is typical of the judicial restraint that Justice Frankfurter was known for, and is not a ruling against such taxation.[10]

Only the quite proper use of judicial restraint in *O'Malley* and later in *Will* prevented the Supreme Court from overruling *Evans*. Now that the question of whether prior judges should be afforded more Compensation Clause protection than new judges is at bar for the first time since the discredited *Miles* decision, reaching back to the 1920 *Evans* case to resolve the question in plaintiffs' favor would require us to willfully ignore the intervening, and uniformly critical, case history. This we decline to do, although because this history developed in factually distinguishable situations, the question in a narrow technical sense will arguably remain open until the Supreme Court addresses the point. As discussed above, the more recent Supreme Court and Court of Claims cases on the Compensation Clause counsel reliance on the dissenting view of Holmes in *Evans* rather than on the majority.[11] There-

[10] *See Jefferson County* v. *Acker*, 850 F. Supp. 1536, 1548 (N.D. Ala. 1994) (indicating in dicta that new judges would be entitled to the same Compensation Clause protection as the prior judges who were plaintiffs in the case).

[11] Plaintiffs agree that the Court of Claims in *Atkins* read the Supreme Court decision in *O'Malley* to adopt Holmes's dissent in *Evans*. Pl. Br. at 33. (A district judge evaluating *O'Malley* recently came to the same conclusion. *Acker*, 850 F. Supp. at 1546.) Though plaintiffs argue that the *Atkins* and Holmes rule allowing judicial salaries to be taxed is incompatible with the *Will* approach banning any diminution in gross judicial pay, Tr. at 70-71, we disagree. As we explained above in part II A, in actuality *Atkins* and *Will* are complementary because they deal with different facts. *Will* expressed the absolute Compensation Clause protection which exists when judicial pay is directly diminished, while the more flexible rule developed in *Atkins* indicates that in cases of indirect, take-home pay diminution like taxation, an inquiry into congressional intent is needed.

fore, we hold that judicial salary, like other components of a judge's income, is taxable. *Will*, 449 U.S. at 227 n.31, 101 S. Ct. at 486 n.31 (citing with approval *O'Malley*, 307 U.S. 277, 59 S. Ct. 838 (1939)); *Evans*, 253 U.S. at 265-266, 40 S. Ct. at 557 (Holmes, J., dissenting); *Atkins*, 214 Ct. Cl. at 216, 556 F.2d at 1044-45.

B

Given that we decline to rely on *Evans*, plaintiffs, in the alternative, claim that the statutes in question violate the Compensation Clause by wiping out a tax advantage prior judges enjoyed relative to other citizens, a situation plaintiffs contend to be different from that presented in *Evans*. Plaintiffs argue that in *Evans*, a new tax was imposed on both judges and other citizens "at the same time;"[12] in contrast, plaintiffs here were

[12] Pl. Reply at 16 n. 7. It is unclear what plaintiffs mean by "at the same time." While it certainly is true that the Revenue Act of 1918 (which was at issue in *Evans*) did for the first time tax the income of judges, § 213, 40 Stat. at 1065, it is also true that the Revenue Acts of 1916 and 1917 had already imposed broad-ranging income taxes, although exempting judges already in office, ch. 463, § 4, 39 Stat. 756, 759 (1916); ch. 63, § 1200, 40 Stat. 300, 329 (1917). Thus, the income tax was imposed on the public years before judges were included. Only by artificially viewing each successive year's income tax statute in isolation can it be said that the Revenue Act of 1918 imposed a tax on the public and on judges "at

subjected to the extension of an old tax they had escaped by becoming judges, thereby unconstitutionally costing sitting judges an advantage they held relative to non-judges. Pl. Reply 16 n.7. As we will show, plaintiffs' attempt to distinguish their case from *Evans* fails.

1

Plaintiffs argue that to be valid, any new tax on prior judges must be simultaneous with taxation of the public. Pl. Reply at 16 n.7; Tr. at 9-10. This is so because as long as an identical burden is simultaneously laid on the public and the judiciary, not even prior judges have suffered a diminution relative to other citizens[13] and so their judicial independence is not potentially threatened. Tr. at 9-10; *see* Pl. Br. at 16, 35-37; Pl. Reply at 19, 21. On the other hand, reason plaintiffs, the taking away of a tax exemption or other advantage held by prior judges relative to other citizens does potentially threaten judicial independence because it singles out judges.[14] *See* Pl.Br. at 20-21, 34; Pl. Reply at 16 n.7, 19.

Looking past the terms of plaintiffs' seemingly novel relativity argument to its substance, it appears plaintiffs' position at bottom is nothing more remarkable than that a new tax laid wholesale on prior judges and

---

the same time." But for purposes of this discussion only, we accept plaintiffs' characterization.

[13] Hereafter, we may refer to this as the "simultaneity requirement."

[14] Hereafter, we may refer to this as plaintiffs' "relativity" argument or analysis.

the public is not discriminatory.[15] While this may be true, it provides no support for plaintiffs' further implication that a tax placed on the public and only later extended piecemeal to prior judges automatically violates the Compensation Clause as a potential threat to the independence of prior judges.

Plaintiffs have pointed to no good reason why Congress in taxing judges has the power to accomplish wholesale what it cannot do piecemeal. *See, e.g.*, Pl. Br. at 34; Pl. Reply at 2-3, 9-10, 12-13, 16 n.7. Plaintiffs equate comparative tax advantages enjoyed by judges with direct increases in judicial pay, arguing that both should at inception be permanent for judges then in office. Pl. Br. at 30-31, 34; Tr. at 8-9. But the purpose of the Compensation Clause is not to make irrevocable every momentary tax exemption enjoyed by sitting judges relative to the public; its purpose is rather to protect the independence of the judicial branch by insuring that judges are shielded from attempts by the political branches to impose economic duress. *O'Malley*, 307 U.S. at 282, 59 S. Ct. at 840; *Evans*, 253 U.S. at 265-67, 40 S. Ct. at 557-58 (Holmes, J., dissenting); *see Atkins*, 214 Ct. Cl. at 223, 556 F.2d at 1048-49. This underlying purpose leads to the simple rule of thumb which governs this case: in general, if judges are treated like other citizens by the tax laws, no threat to judicial independence arises, and so the Compensation Clause is not implicated. Congress always has the power to place judges in tax parity with other citizens.

---

[15] Plaintiffs posit a scenario (first rhetorically raised in *Atkins*, 214 Ct. Cl. at 223, 556 F.2d at 1048) in which an enormous tax is laid across the land and then all other federal workers or citizens except judges get a raise or some other kind of relief. Pl. Br. at 36 n. 22. Suffice it to say that we do not here prejudge such a case.

2

Plaintiffs profess not to rely on *Evans* in deriving the simultaneity requirement for the taxation of prior judges. But plaintiffs' simultaneity requirement leads inescapably to the conclusion that the Compensation Clause provides the class of prior judges more tax protection than it does to new judges. This is the very conclusion that we rejected in refusing to rely on *Evans* above in part A. The new packaging does not yield a different result. Barring some sort of targeted discrimination, the finances of one individual judge or even a class of judges is not the concern of the Compensation Clause.[16] There is no requirement that prior judges be treated any differently from new judges for tax purposes: a judge escapes neither the present nor the future obligations of citizenship by taking the oath of office.

C

Plaintiffs go on to claim that even with the above arguments conceded Social Security is not a tax of general applicability like the one which was held proper as to judges in *O'Malley*. Pl. Reply at 24-25; Tr. at 15-16, 72-73. In this vein, plaintiffs first contend that

---

[16] The proper constitutional focus is on the interaction between the branches of government, not on the appointment dates of individual judges. (It might be said that plaintiffs' analysis neglects the constitutional dimension of this case in favor of the astronomical.) The Compensation Clause is "not a private grant of privilege [to judges] but a limitation intended to benefit the public at large," *Atkins*, 214 Ct. Cl. at 223, 556 F.2d at 1049. The same idea is expressed in *Will*, 449 U.S. at 217, 101 S. Ct. at 481-82 and *O'Donoghue* v. *United States*, 289 U.S. 516, 533, 53 S. Ct. 740, 744, 77 L.Ed. 1356 (1933).

Social Security is not an income tax, but is rather a contributory public benefit plan. *E.g.* Pl. Br. at 26-27. In addition, plaintiffs maintain that Social Security taxes are not a truly general obligation of citizenship because the plan is not universal. *Id.*; Tr. at 72-73.

1

A close reading of plaintiffs' arguments shows that they do not seriously contend that Social Security is a contractual benefit plan rather than an income tax. In fact, plaintiffs themselves note that Social Security benefits are by no means guaranteed, and that the Congress could limit or cancel benefits under the program. Tr. at 10-11 (citing *Bowen* v. *Public Agencies Opposed to Soc. Secur. Entrapment*, 477 U.S. 41, 51-52, 106 S. Ct. 2390, 2396-97, 91 L.Ed.2d 35 (1986)). We agree. Of course, the taking of money by the federal government with no specific return obligation is typical of tax schemes, including income taxes. And, in fact, Social Security has long been treated as an income tax by courts. *Helvering* v. *Davis*, 301 U.S. 619, 634-35, 57 S. Ct. 904, 905-06, 81 L.Ed. 1307 (1937). It is plain that Social Security imposes an income tax.

2

At the heart of plaintiffs' argument that Social Security is not a tax of general applicability is the contention that the Social Security income tax is not sufficiently widespread. *See* Pl. Br. at 26, 36-37; Tr. at 72. We disagree. Social Security is a tax of general applicability, and so can be applied to federal judges. The parties have stipulated to the following facts: during 1984, the percentage of the paid civilian labor force covered by Social Security climbed from 91

percent to 93 percent, Jt. Stip. ¶ 18 (Appendix C to Pl. Br.), even while the paid civilian labor force increased from 102.2 million workers to 105.5 million, Jt. Stip. ¶ 27 (Table 4).

This amounts to effectively universal coverage of the nation's work force.[17] Given the web of exemptions and deductions allowed by Congress in virtually all areas of taxation, it is doubtful if any federal tax is of general applicability in the sense of applying to 100 percent of the possible taxpayers. We do not need to decide the boundaries of the term "a tax of general applicability" today. It is enough to say that the Social Security income tax, which at all times relevant to this litigation covered over 90 percent of paid civilian workers, is a tax of general applicability like that held valid as to judges by the Supreme Court in *O'Malley*.

D

Plaintiffs' last main Compensation Clause contention, somewhat linked to the idea that Social Security is not a tax of general applicability, is that the plaintiff judges were discriminated against as compared to the other federal employees affected by the same Social Security amendments. Pl. Br. at 37-38, 40, 43; Pl. Reply at 24; Tr. at 12, 15-17, 19, 22-23, 72-74. Plaintiffs contend that a Compensation Clause violation arises because judges, unlike all other federal employees, faced a mandatory reduction in take-home pay. Pl. Br. at 40, 43; Tr. at 74-75.

---

[17] In September 1983, there were over 2.7 million federal employees. Jt. Stip. P 19.

1

However, using federal employees instead of the general public as the Compensation Clause benchmark to determine the validity of a tax does not help plaintiffs in this case, since for purposes of this discussion the two groups have historically been treated alike.

Most federal employees have long been required to contribute to retirement plans in order to obtain retirement benefits. *See* 5 U.S.C. §§ 8331-48 (1988). This does not apply to Article III judges, whose basic retirement plan is free, and provides for lifetime full pay when certain age and length of service requirements are met. 28 U.S.C. § 371 (1988). By the acts challenged here, Congress expanded Social Security to cover most federal positions, including Article III judgeships, for the first time. Jt. Stip. ¶ 20. Speaking generally, Congress reduced or offset the contribution federal employees were required to make to their retirement plan by the amount of any newly required Social Security tax. Pl. Proposed Findings of Uncontroverted Fact ¶ 11 ("PPUF"). The retirement plan benefits of federal employees were correspondingly reduced to account for any newly expected Social Security benefits. *E.g.*, Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub. L. 98-168, § 206(c)(2), 97 Stat. 1106, 1109-10 (1983) (codified as amended in a note after 5 U.S.C. § 8331 (1988)). The net result of inclusion in Social Security for most federal workers thus was no change in take-home pay or benefits. It is plainly the view of Congress that the Social Security tax is fungible with the other retirement payments required of federal employees. Thus, both before and after the acts in question, almost all

non-judicial federal employees, like over 90 percent of the nation's civilian workers, paid Social Security taxes or a mandatory equivalent.

Judges, with no retirement plan contributions to offset, were unique among federal employees in seeing their take-home pay necessarily decrease by the amount of the Social Security tax. PPUF ¶ 12. But this happened only because judges, unlike other federal employees and citizens, were never before required to pay into Social Security or a retirement plan equivalent to Social Security. There is no reason that tax burdens equivalent to those long required of other federal employees and working citizens cannot be extended to judges. *See supra*, part B(1). Here, the central Compensation Clause taxation rule has not been violated: judges are being treated no worse than other federal employees and citizens.

2

Even if we were to assume that the Social Security taxes at issue here did hurt judges compared to other federal workers, plaintiffs' Compensation Clause claim would not succeed. This is because in cases of indirect reduction in judicial compensation, it is an open question whether evidence of Congressional intent to pressure the judiciary would be enough to invalidate a statute. *Will*, 449 U.S. at 226 n. 30, 101 S. Ct. at 486 n.30. At any rate, without evidence of such an intent this legal question is moot. *Atkins*, 214 Ct. Cl. at 216, 228, 235, 556 F.2d at 1045, 1051, 1055.

In this case, there is absolutely no evidence of an intent to influence the judiciary. This conclusion is not disputed by plaintiffs, Pl. Br. at 21-22; *see* Pl. Reply at

2; rather, plaintiffs' by-now familiar argument is that any reduction in take-home pay should be handled like a direct reduction in salary, that is to say it is prohibited by the Compensation Clause regardless of congressional intent. Pl. Br. at 21-23; Pl. Reply at 2, 10, 12; Tr. at 69, 71-72.

As indicated above, plaintiffs' conclusion ignores two related rules of Compensation Clause jurisprudence. First, in case of an indirect diminution of judicial compensation, it is at least arguable that judges seeking relief under the Compensation Clause for an indirect reduction in pay must show not just a discriminatory effect but an intent to influence the judiciary. *See Will*, 449 U.S. at 226 n.30, 101 S. Ct. at 486 n.30; *Atkins*, 214 Ct. Cl. at 233, 556 F.2d at 1054. Second and more important to the instant case, it is clear that if the indirect diminution is due to a tax of general applicability and the possibility of discriminatory legislative intent has been ruled out, the tax is valid under the Compensation Clause. *O'Malley*, 307 U.S. at 282, 59 S. Ct. at 840; *Atkins*, 214 Ct. Cl. at 216, 556 F.2d at 1044-45. That is the case here.

IV

Plaintiffs claim that if their constitutional argument fails, they still may be able to prevail on a contract theory. Second Am. Cplt. Count III at 8-9. Defendant has moved for summary judgment on the contract claim, maintaining that judges serve pursuant to appointment, not contract. Def. Br. at 38-41.

Plaintiffs are unable to cite any convincing authority for the proposition that judges are contract employees. *See, e.g.*, Pl. Reply at 27-29; Tr. at 31-38. Plaintiffs point

chiefly to *Embry* v. *United States*, 100 U.S. 680, 25 L.Ed. 772 (1879), wherein the Supreme Court made the following statement: "No officer except the President or a judge of a court of the United States can claim a contract right to any particular amount of unearned compensation." 100 U.S. at 685. While this isolated sentence may be in plaintiffs' favor, the case it comes from is not. The holding of *Embry* is not that judges have a contract right to compensation while in office; in fact, the case is not about judges at all, nor even about incumbent officeholders. Instead, *Embry* holds that non- judicial federal officers such as postmasters do not have a contract right to compensation while suspended from office. 100 U.S. at 685. Since judges can only be impeached, not suspended, *Embry* has no relevance here. At any rate, the sentence relied on by plaintiffs, besides being taken out of context, is wholly unnecessary to the holding of the case and thus a textbook example of *dicta*.

Plaintiffs claim that even if *Embry* is distinguishable, this case falls squarely under the rule of *Johnson* v. *United States*, 111 Ct. Cl. 750, 79 F. Supp. 208 (1948). Tr. at 66. Again, we disagree. Johnson involved a judge who resigned from office. The Court of Claims found that such a judge has a contract or property right to his retirement pay. 111 Ct. Cl. at 756, 79 F. Supp. at 211. Without assessing the validity of this *Johnson* holding today, we note that a judge who resigns (as the plaintiff did in *Johnson*) is no longer a federal officeholder. *Booth* v. *United States*, 291 U.S. 339, 348-50, 54 S. Ct. 379, 380-81, 78 L.Ed. 836 (1934). At best for plaintiffs, *Johnson* holds that judges who resign from office in reliance on future retirement payments may have a contract remedy. The *Johnson* case has no

applicability to cases involving compensation for sitting Article III judges.[18]

Plaintiffs have cited no controlling authority indicating a possible contract claim. Pl. Reply at 27-29; Tr. at 31-37, 65-66. In our view, no such claim exists.

V

Plaintiffs' contention that the extension of Social Security taxes to sitting Article III judges violated the Compensation Clause is a pure question of constitutional law. There are no material facts in dispute. Therefore, defendant is entitled to judgment on Counts I and II, (Second Am. Cplt. at 7-8), as a matter of law. RCFC 56(c).

Plaintiffs' contention that they have a contract right to compensation is likewise a pure question of law involving no disputed material facts. Therefore, defendant is entitled to judgment on the contract claim, (Count III, Second Am. Cplt. at 8-9), as a matter of law. RCFC 56(c).

Based on the foregoing, plaintiffs' motion for summary judgment is DENIED, and defendant's cross-motion for summary judgment is GRANTED. Accordingly, judgment shall be entered in favor of defendant.

Each party shall bear its own costs.

---

[18] This conclusion is strengthened by the fact that the Court of Claims in *Johnson* did not once cite the *dicta* from *Embry* which, if read in isolation, indicates that sitting judges have a contract right to compensation.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 94-5139

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER, AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFFS-APPELLANTS

v.

THE UNITED STATES, DEFENDANT-APPELLEE

[Filed: Aug. 30, 1995]

Before: ARCHER, Chief Judges, PLAGER, and RADER, Circuit Judges.

RADER, Circuit Judge.

Sixteen federal judges challenged the withholding of Social Security taxes from their judicial salaries as a violation of the Compensation Clause of the United

States Constitution, Article III, section 1. Accordingly, they sought a tax refund or recovery of their diminished compensation. The United States Court of Federal Claims granted the Government summary judgment. *Hatter* v. *United States*, 31 Fed. Cl. 436 (1994). Because the Compensation Clause forbids diminishments in the compensation of Article III judges after they have taken office, and because the trial court did not determine whether a diminution in fact occurred, this court reverses and remands.

BACKGROUND

Until 1983, judges appointed under Article III of the Constitution, like most federal employees, did not participate in the Social Security program. Most legislative and executive federal employees acquired a retirement annuity by contributing to the Civil Service Retirement System. 5 U.S.C. §§ 8331-51 (1994). After meeting age and service requirements, however, Article III judges receive a retirement annuity equal to their judicial salaries without making additional payments. 28 U.S.C. § 371(a) (1988 & Supp. V 1993).

In the early 1980s, Congress ordered withholding of certain components of the Social Security tax from the salaries of most federal employees, including Article III judges. Withholding of the Hospital Insurance portion began on January 1, 1983. Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 278(a), 96 Stat. 324, 559, 562 (codified as amended at 26 U.S.C. § 3121(u) (1988)). Withholding of the Old Age and Survivors Disability Insurance portion began on January 1, 1984. Social Security Amendments of 1983, Pub. L. No. 98-21, § 101(a)(1),(b)(1) & (d), 97 Stat. 65, 67-70 (codified as amended at 26 U.S.C. § 3121(b)(5)(E) (1988 & Supp.

V 1993) and 42 U.S.C. § 410(a)(5)(E) (1988 & Supp. V 1993)).

Sixteen Article III judges—all appointed before January 1, 1983—sued in the Court of Federal Claims for a refund of these Social Security taxes or recovery of their diminished compensation. The judges claimed that the taxation diminished their judicial compensation in violation of the Compensation Clause of the Constitution. The trial court granted the Government summary judgment that the Compensation Clause does not prohibit application of the tax to sitting Article III judges. *Hatter*, 31 Fed. Cl. at 445-47. The claimants appealed.

DISCUSSION

This court reviews a grant of summary judgment by the Court of Federal Claims *de novo*. *Cohen* v. *United States*, 995 F.2d 205, 207 (Fed. Cir. 1993).

I.

The Constitution's Compensation Clause states:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services a Compensation, *which shall not be diminished during their Continuance in Office.*

U.S. Const. art. III, § 1 (emphasis added). This constitutional language protects one of the most remarkable innovations of the 1787 document: a judicial branch sufficiently independent to enforce constitutional limitations on all branches of Government. The Supreme Court acknowledged:

> The Compensation Clause has its roots in the longstanding Anglo-American tradition of an independent Judiciary. A Judiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by other branches of government.

United States v. *Will*, 449 U.S. 200, 217-18, 101 S. Ct. 471, 482, 66 L.Ed.2d 392 (1980). Alexander Hamilton, writing in *The Federalist* No. 79, explained the Framers' reasoning for this means of protecting the separation of powers: "In the general course of human nature, a power over a man's subsistence amounts to a power over his will." *The Federalist* No. 79, at 472 (Clinton Rossiter ed., 1961) (emphasis omitted).

To provide a judiciary with sufficient independence to protect constitutional rights against any incursion, the Framers adopted an unrestricted protection for judicial compensation. Judicial independence, Alexander Hamilton prophetically noted, would prove "the citadel of the public justice and the public security." *The Federalist* No. 78, at 466 (Clinton Rossiter ed., 1961). Thus, as the Supreme Court concluded:

> [T]he prohibition against diminution was not to benefit the judges, but, like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guaranties, limitations, and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

Evans v. *Gore*, 253 U.S. 245, 253, 40 S. Ct. 550, 553, 64 L.Ed. 887 (1920). For these reasons, the Constitution's language broadly prohibits any diminution in judicial compensation during a judge's continuance in office.

II.

This case raises the question whether imposition of new taxes on judges after they have taken office unconstitutionally diminishes their compensation. The Supreme Court addressed this very issue in *Evans*. In *Evans*, the Court held that the Compensation Clause prohibited imposition of the newly enacted income tax on sitting judges. Examining the broad constitutional protection for judicial independence, the Court wrote:

> The prohibition is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another; and the reasons for its adoption . . . make with impelling force for the conclusion that the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise,—that they regarded the independence of the judges as of far greater importance than any revenue that could come from taxing their salaries.

Id. at 255, 40 S. Ct. at 553; *see also id.* at 249-52, 40 S. Ct. at 553.

When the judges in *Evans* first assumed office, Congress had not charged them with the duty of paying income taxes. Thus, the imposition of these taxes on their salaries acted as a reduction in their salary. As the Court observed:

> Here the Constitution expressly forbids diminution of the judge's compensation, meaning, as we have shown, diminution by taxation or otherwise . . . . [T]he compensation suffers a diminution to the extent that it is taxed.

Id. at 264. The Court therefore invalidated application of the income tax to judges who had taken office prior to the tax.

Evans controls this case. The claimants here are Article III judges who took office prior to imposition of the Social Security taxes in question. Federal law did not charge the claimants with the duty of paying Social Security taxes when they first assumed office. Subsequent imposition of the taxes reduced the claimants' salaries, as in *Evans*.

The subsequent Supreme Court case of *O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939), does not affect this analysis. In that case, the Court held that newly appointed Article III judges must continue to pay income taxes just as they had prior to appointment:

> To subject them to a general tax is merely to recognize that judges are also citizens, and that their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering.

Id. at 282, 59 S. Ct. at 840.

Because the claimants in *O'Malley* took office after Congress had made income taxes applicable to judges' salaries, those judicial claimants suffered no diminishment in compensation after taking office. The tax was a pre-existing obligation factored into the new judges' compensation. On this basis *O'Malley* is distinguishable from *Evans* and the facts of this case. In *Evans* and this case, the claimants were already judges when the Social Security taxes took effect. The taxes therefore affected the claimants' established compensation. Thus, Congress's imposition of the Social Security tax on the claimants triggered scrutiny under the Compensation Clause.

The Supreme Court has stated that *O'Malley* "undermined the reasoning of *Evans*." *United States* v. *Will*, 449 U.S. 200, 227 n.31, 101 S. Ct. 471, 487 n.31, 66 L.Ed.2d 392 (1980). This court's predecessor has made the same point. *See Atkins* v. *United States*, 556 F.2d 1028, 1044, 214 Ct. Cl. 186 (1977) (en banc), *cert. denied*, 434 U.S. 1009, 98 S. Ct. 718, 54 L.Ed.2d 751 (1978). Neither of these pronouncements, however, are sufficient to overrule *Evans*. Had changes in judicial doctrine in fact "removed or weakened the conceptual underpinnings" of *Evans*, the Court itself would have overruled the case. *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 173, 109 S. Ct. 2363, 2370-71, 105 L.Ed.2d 132 (1989). It has not done so. Further, as the Supreme Court recently stated:

> If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.

Rodriguez de Quijas v. *Shearson/American Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22, 104 L.Ed.2d 526 (1989). Again, the Supreme Court has never overruled *Evans*. *Evans* governs this case more directly than *O'Malley*.

The trial court erred by upholding the imposition of Social Security taxes on the claimants on the grounds that such taxation was both "generally applicable" and "non-discriminatory." *See O'Malley*, 307 U.S. at 282, 59 S. Ct. at 840; *see also Atkins*, 556 F.2d at 1045. The trial court holding thus interprets the Constitution's Compensation Clause to forbid only discriminatory taxes which single out the federal judiciary. In other words, the trial court in effect read the term "compensation" as synonymous with "salary," and "diminished" as synonymous with "intentionally reduced." This reading limited the protections for judicial independence to discriminatory attacks on the judiciary in the form of direct reductions in salary.

The words of the Constitution are not so limited, nor are its protections for judicial independence. "Compensation" embraces all forms of remuneration, not merely salary. "Diminished" embraces all means of decreasing, regardless of the intent or target of the reduction. Thus, the Constitution protects judicial compensation against all forms of diminishment.

The Constitution's enactment history supports this reading of the Compensation Clause. On June 13, 1787, the Constitutional Convention's Committee of the Whole drafted a resolution prohibiting Congress from

either increasing or decreasing the compensation of judges. Clinton Rossiter, *1787: The Grand Convention* 365 (1966). Gouveneur Morris opposed the prohibition on increases, as he believed that Congress should have the power to augment judicial compensation "as circumstances might require" to avoid "any improper dependence in the judges." 2 Max Farrand, *Records of the Federal Convention of 1787* at 44 (1911). Benjamin Franklin agreed and specified two circumstances—increases in workload and inflation of the currency—which would justify an increase. *Id.* at 44-45.

James Madison favored retaining the ban on increases in compensation. He feared that judges might unduly defer to Congress during legislative consideration of pay raises. *Id.* at 45. In other words, the Convention was unanimous on the overriding concern of protecting the judicial branch against meddling with its compensation. Further, the Convention voiced grave concerns about potential compromises in judicial independence if judges faced the prospect of seeking legislative redress of compensation concerns. In sum, the Convention perceived only mischief in the prospect of judges approaching the legislative branch to seek proper compensation. Ultimately, on a vote of 6-2, with one state absent, the Convention permitted increases and forbade all decreases in judicial compensation. *Id.* at 45.

Alexander Hamilton later explained this result:

> It will readily be understood that the fluctuations in the value of money and in the state of society rendered a fixed rate of compensation in the Constitution inadmissible. What might be extravagant today might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances, yet under such restrictions as to put it out of the power of that body to change the condition of the individual [judge] for the worse.

The Federalist No. 79, at 473 (Alexander Hamilton) (Clinton Rossiter ed., 1961). According to Hamilton, the Compensation Clause's term "diminished" forbids any action which changes the "condition of the individual [judge] for the worse." *Id.*

James Madison concurred in Hamilton's analysis and extended the coverage of the term "compensation" to all "emoluments" of the judicial office:

> [M]embers of each department should be as little dependent as possible on those of the others for the emoluments annexed to their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be nominal.

The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961). In sum, the Convention considered judicial independence a core value of the Constitution and adopted a broad protection for it. *See Will*, 449 U.S. at 217-21, 101 S. Ct. at 481-84; *Evans*, 253 U.S. at 252-55, 40 S. Ct. at 552-54.

The text and history of the Compensation Clause do not support the test applied by the trial court. The Supreme Court itself suggested as much in *Will* where, in considering Congress's rescission of judicial pay raises, the Court stated: "the Constitution makes no

exceptions for 'nondiscriminatory' reductions." *Will*, 449 U.S. at 226, 101 S. Ct. at 486.

The Government's attempt to limit this statement in *Will* to 'direct diminutions' is unpersuasive. *O'Malley*, distinguished by the *Will* Court as applying a nondiscrimination test, held that nondiscriminatory taxation of a judge *who took office after the tax went into effect* does not violate the Compensation Clause. In such circumstances, the taxation formed part of that judge's compensation scheme from the outset of his tenure. *See O'Malley*, 307 U.S. at 282, 59 S. Ct. at 838.

Nor does *Atkins* provide support for application of a nondiscrimination test to the taxes imposed in this case. In *Atkins*, the United States Court of Claims found that Congress' failure to raise judicial salaries during a period of high inflation was not an actionable diminution under the Compensation Clause, because the plaintiff judges could not show that Congress intended an attack on the judiciary's independence.

However appropriate it may be to consider whether inflation diminishes judicial compensation in a discriminatory fashion, as in *Atkins*, or applies taxes of general applicability to judges taking office after such taxes are effective, as in *O'Malley*, neither the Compensation Clause nor Supreme Court precedent supports applying a non-discrimination test to the imposition of a new tax, even though generally applicable, on sitting judges. As indicated above, the controlling Supreme Court precedent, *Evans*, instructs otherwise. *Evans*, 253 U.S. at 254-55, 40 S. Ct. at 553-54. Under *Evans*, only judges who took office prior to the imposition of the new Social Security taxes suffered a diminution.

III.

The trial court did not determine whether the Social Security taxes in this case in fact diminished the claimants' compensation. Although noting that inclusion in Social Security might not result in an overall reduction of compensation, *Hatter*, 31 Fed. Cl. at 441 n.9, the trial court assumed a reduction, noting the decrease at least in take-home pay, for the purpose of resolving the summary judgment motions before it and proceeding to the constitutional issue.

As noted, the term "compensation" extends beyond mere salary, and includes all forms of remuneration attached to the judicial office. Therefore, the claimants' new Social Security retirement benefits, if any, are part of their compensation. These future benefits, however, are not vested in any manner. They thus do not give the claimants a certain entitlement to any offsetting sum. In addition, innumerable individual scenarios could eliminate a claimant's potential Social Security benefit, or greatly reduce the amount of the potential benefit. Because of all the variables that would have to be taken into account in arriving at even a rough estimate of a current discounted value for Social Security benefits that might be payable in the future, it is impossible accurately to weigh these benefits against the taxes withheld from the claimants.

It is certain, however, that the Social Security taxes diminished the claimants' salaries by specific amounts. The reduction was concrete, while the potential future benefit is entirely speculative. A speculative, incalculable future benefit cannot offset a concrete, present

reduction.* The Social Security taxes therefore diminished the claimants' compensation in violation of the Compensation Clause.

CONCLUSION

Social Security taxes diminish the compensation of Article III judges who took office prior to enactment of the taxes. This court therefore reverses and remands the case for tax refunds or recoveries for the sums improperly withheld from the claimants' salaries.

COSTS

Each party shall bear its own costs.

REVERSED and REMANDED.

* If the future benefits were calculable and marketable, however, an unconstitutional diminution in compensation would occur when a present reduction exceeded the present value of the future benefits minus reasonable transaction costs in marketing them.

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 94-5139

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER, AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFFS-APPELLANTS

v.

THE UNITED STATES, DEFENDANT-APPELLEE

[Filed: Dec. 26, 1995]

ORDER

A combined petition for rehearing and suggestion for rehearing in banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the petition for rehearing having been referred to the panel that heard

the appeal, and thereafter the suggestion for rehearing in banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the suggestion for rehearing in banc be, and the same hereby is DECLINED.

The mandate of the court will issue on January 2, 1996.

FOR THE COURT,
FRANCIS X. GINDHART, CLERK

Dated: December 26, 1995

/s/ By DIANE M. FRYE
DIANE M. FRYE
Chief Deputy Clerk

APPENDIX G

SUPREME COURT OF THE UNITED STATES

October 7, 1996

Affirmed for Absence of Quorum

No. 95-1733. *UNITED STATES* v. *HATTER, JUDGE, UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, ET AL.*, C.A. Fed. Cir. Because the Court lacks a quorum, 28 U.S.C. § 1, and since a majority of the qualified Justices are of the opinion that the case cannot be heard and determined at the next Term of the Court, the judgment is affirmed under 28 U.S.C. § 2109, which provides that under these circumstances the Court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided Court. JUSTICE STEVENS, JUSTICE O'CONNOR, JUSTICE GINSBURG, and JUSTICE BREYER took no part in the consideration or decision of this petition. Reported below: 64 F.3d 647.

APPENDIX H

UNITED STATES COURT OF FEDERAL CLAIMS

No. 705-89 C

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., DOLORES LEE BURCIAGA, EXECUTIX OF THE ESTATE OF CHIEF JUDGE JUAN G. BURCIAGA, DECEASED, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFFS

v.

THE UNITED STATES OF AMERICA, DEFENDANT

[June 6, 1997]

OPINION AND ORDER

TURNER, Judge.

This opinion addresses all damages issues related to claims by 16 federal judges that their compensation was

unlawfully diminished by imposition of Social Security taxes. There are no material facts in dispute.[1]

For reasons stated below, we conclude that eight of the plaintiffs are entitled to refunds of a portion of Social Security taxes withheld from salary in January 1984, together with compound interest. We further conclude, however, that any additional recovery is either barred by the applicable statute of limitations or offset by salary increases and that, consequently, the bulk of plaintiffs' claims for damages must be denied.

I

Plaintiffs are 16 federal district and circuit judges[2] who took office prior to January 1, 1983. On that date, all federal judges for the first time became subject to the Hospital Insurance (Medicare) (hereafter HI) portion of the Social Security tax.[3] Tax Equity and Fiscal Responsibility Act, Pub. L. No. 97-248, § 278(a), 96 Stat. 324, 559 (1982) (codified as amended at 26 U.S.C. (I.R.C.) § 3121(u) (1988)). One year later, judges

---

[1] Procedurally, the case stands on three dispositive motions: plaintiffs' motion filed November 12, 1996 for summary judgment and defendant's pair of motions filed December 18, 1996, one a cross-motion for summary judgment and the other a motion to dismiss-in-part on limitations grounds. Oral argument was conducted on March 7, 1997. The order in Part IX of this opinion resolves all three dispositive motions.

[2] In two instances, a current plaintiff is the legal successor in interest to an original plaintiff. Further, Judge Raul A. Ramirez resigned effective as of January 1, 1990.

[3] The Hospital Insurance tax (HI) funds Medicare Part A and is imposed upon employees by 26 U.S.C. § 3101(b). During 1983 the HI tax was 1.3 percent of the first $35,700 of compensation. Def. Br. (12/18/96), p. 7.

became subject to the Old Age Survivors and Disability Insurance (hereafter OASDI) portion of the Social Security tax, and since January 1, 1984, all federal judges have been fully subject to Social Security taxes.[4] Social Security Amendments of 1983, Pub. L. No. 98-21, § 101(a)(1), (b)(1) and (d), 97 Stat. 65, 68, 69 (codified as amended at 26 U.S.C. (I.R.C.) § 3121(b)(5)(E) (1988) and 42 U.S.C. § 410(a)(5)(E) (1988)). Social Security taxes have been duly withheld from plaintiffs' monthly compensation since the effective dates of these acts.

Since the original plaintiffs filed their complaint on December 29, 1989, there have been four prior published opinions regarding this case. Chronologically, they are *Hatter* v. *United States*, 21 Cl. Ct. 786 (1990) (*Hatter I*), *Hatter* v. *United States*, 953 F.2d 626 (Fed. Cir.1992) (*Hatter II*), *Hatter* v. *United States*, 31 Fed. Cl. 436 (1994) (*Hatter III*), and *Hatter* v. *United States*, 64 F.3d 647 (Fed. Cir.1995) (*Hatter IV*), *aff'd by a divided court*, —— U.S. ——, 117 S. Ct. 39, 136 L.Ed.2d 3 (1996).

In *Hatter I*, this court dismissed plaintiffs' claim for lack of jurisdiction, concluding that the plaintiffs were seeking a tax refund and had failed to observe statutory prerequisites to suit. *Hatter I*, 21 Cl. Ct. at 789. The Federal Circuit reversed, holding that plaintiffs were not seeking tax refunds, but rather were asserting damage claims arising directly under the Constitution which mandates the payment of money. *Hatter II*, 953 F.2d at 630. The case was remanded to this court for a determination on the merits.

---

[4] Pursuant to 26 U.S.C. §§ 3101 and 3121(a) and section 230 of the Social Security Act (42 U.S.C. § 430), the 1984 OASDI tax was 5.4 percent of the first $37,800 of compensation.

In *Hatter III*, 31 Fed. Cl. at 447, this court dismissed plaintiffs' claims on the merits. We held that although Social Security taxes caused a reduction in the judges' take-home pay, imposition of the taxes did not violate the Compensation Clause of the Constitution, since the Social Security taxes imposed were nondiscriminatory and generally applicable to the public.

The Federal Circuit reversed, holding that the imposition of Social Security taxes on sitting judges diminished their compensation. *Hatter IV*, 64 F.3d at 652-53. The Federal Circuit remanded the case for award of "tax refunds or recoveries for the sums improperly withheld from the claimants' salaries." *Id.* at 653.

II

In this damages proceeding, plaintiffs seek recovery of the total amount of HI and OASDI taxes withheld from their salaries from 1983 to the present, plus interest compounded annually. In total, plaintiffs request an award in the amount of $1,059,675.59 (as of January 15, 1997).

Plaintiffs take the position that the court's task is limited to calculating the precise amounts of HI and OASDI taxes withheld from their salaries and making an award of those amounts with compound interest. Plaintiffs say with respect to principal that the remand directions of the Federal Circuit in *Hatter IV* are not subject to any other reasonable interpretation.

Defendant argues that all plaintiffs' claims are time-barred to the extent they seek to recover for any amounts withheld prior to January 1, 1984. Similarly,

defendant argues that claims by those judges added to the case in 1992 are time-barred at least for years 1984, 1985, and part of 1986 because those claims had accrued more than six years before these judges or new claims were added to the current action.

Defendant further argues that salary increases beginning as of January 1, 1984 more than offset the amount of any Social Security tax deductions from the plaintiffs' salaries for services during and after 1984. Finally, defendant asserts that the plaintiffs are not entitled to an award of interest on any recovery of principal.

III

The history of claim presentation and appearance of plaintiffs in this litigation provides a useful beginning for resolution of damages issues.

A

The original complaint was filed on December 29, 1989 by ten judges. The complaint was specifically limited to OASDI taxes withheld on and after January 1, 1984. The complaint did not object to or otherwise address imposition of HI taxes which had become effective on January 1, 1983 and did not request any damages for taxes withheld during 1983.

After the remand instructing this court to resolve the merits of the case, *Hatter II*, 953 F.2d at 630, a First Amended Complaint was filed on June 25, 1992. This pleading, submitted more than nine years after imposi-

tion of HI taxes, added four new plaintiffs[5] and set forth an alternative claim for tax refunds but, like the original complaint, expressed no objection to imposition of HI taxes and made no request for damages suffered in 1983.

A Second Amended Complaint was presented on December 11, 1992 (filed on January 11, 1993). This pleading added two new plaintiffs (bringing the total to the current 16) and, for the first time, asserted a right to damages resulting from imposition of HI taxes on January 1, 1983.[6]

As is clear from the foregoing, all 16 plaintiffs first presented a claim for recovery of HI taxes more than nine (almost ten) years after the tax was imposed. Although the original complaint presented OASDI claims, only eight of the current plaintiffs were in the case on the first remand in 1992. In June 1992, two original plaintiffs reasserted and four new plaintiffs asserted for the first time claims related to OASDI taxes; in December 1992, two additional new plaintiffs

---

[5] After the first judgment by this court dismissing the claims for failure of jurisdictional prerequisites, see *Hatter I*, 21 Cl. Ct. at 789, only eight of the original ten plaintiffs appealed from the judgment, and consequently only eight plaintiffs were in the case upon the first remand. The First Amended Complaint filed on June 25, 1992 actually added six plaintiffs, but two of them (Judges Bowen and Roettger) were original plaintiffs who had not appealed from the first judgment.

[6] In the original complaint, ¶ 16 at p. 5, and in the First Amended Complaint, ¶ 21 at pp. 5-6, plaintiffs in those pleadings asserted that the imposition of OASDI taxes on January 1, 1984 represented the first time that Social Security deductions were withheld from judges' compensation.

asserted for the first time claims related to OASDI taxes.

(For ease of reference, we hereafter designate the eight original plaintiffs who prosecuted the first appeal and were part of the case upon the first remand as the "original" plaintiffs and the remaining eight plaintiffs who first joined or rejoined the suit after the first remand as the "later-filing" plaintiffs.)

B

In the remainder of this opinion, we first address the OASDI claims of the "original" plaintiffs.

Thereafter, we address (1) the OASDI claims of the eight "later-filing" plaintiffs and (2) the claims of all plaintiffs based on imposition of HI taxes. Resolution of these claims involves application of statutes of limitations together with related issues including the "relation-back" doctrine and the "continuing claim" doctrine.

Finally, we address the issue of interest on damages awards for Compensation Clause violations.

IV

In *Hatter IV*, 64 F.3d at 653, the Federal Circuit remanded "for tax refunds or recoveries for the sums improperly withheld from the claimants' salaries." Remand was necessary because "the trial court did not determine whether the Social Security taxes in this case *in fact* diminished the claimants' compensation." *Id.* at 652 (emphasis added).

A

At all material times, the salaries of federal judges have been paid in monthly installments as of the first day of each calendar month for services during the preceding calendar month. Hence, the salary payments to plaintiffs on or about January 1, 1984 were for services during December 1983, and OASDI taxes withheld from such salary installment, although assessed with respect to and extracted from salary paid in 1984, had the effect of reducing compensation earned in December 1983.

Defendant concedes, in light of *Hatter IV*, that eight of the plaintiffs[7] are entitled to damages for the amount of OASDI taxes withheld from salary payments made in January 1984 for services in December 1983. That amount is $328.95 for seven of the original plaintiffs who were district judges on January 1, 1984, and $347.85 for the original plaintiff who was a circuit judge on January 1, 1984. Def. Br. (2/25/97), p. 4.

Because no salary increase which first became effective on or after January 1, 1984 was retroactive to December 1983, there has been no possible cure of diminution which occurred with respect to income accrued for December 1983. Therefore, we agree with defendant that the eight plaintiffs indicated are entitled to recover the amount equal to OASDI taxes withheld from salary payments in January 1984.

---

[7] District Judges Hatter, Arceneaux, Beer, Burciaga, McNamara, Ramirez, and Wiseman (or their successors in interest) and Circuit Judge Pregerson.

We address in Part VIII below plaintiffs' claims of entitlement to interest on damages.

B

Defendant contends that pay increases in 1984 and subsequent years have offset the diminution of plaintiffs' salaries caused by all OASDI taxes (in fact, all Social Security taxes) withheld from salary payments after January 1, 1984. Even though the Federal Circuit held in *Hatter IV*, 64 F.3d at 652, that "the Social Security taxes diminished the claimants' salaries by specific amounts," it did not have occasion to consider whether a simultaneous or subsequent retroactive increase could offset or cure the diminution in Article III compensation[8] resulting from the Social Security tax deductions. The issue is one of first impression.

In resolving the issue, we start with a straightforward application of arithmetic and logic to the question whether a simultaneous or subsequent pay raise can cure prospectively any diminution resulting from the imposition of a new tax. We then apply two concepts gleaned from legislation and case law, to wit, (1) that taxation of judges' compensation does not, per se, constitute an unlawful diminution, rather it is imposition of a new tax on sitting judges which results in a prohibited diminution, and (2) that Congress has no

---

[8] The Compensation Clause in the United States Constitution provides: "The Judges, both of the supreme and inferior Courts, shall hold their offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. art. III, § 1.

enforceable duty to raise the salaries of judges, rather any increase is a matter of legislative discretion.

1

At the outset, one would suppose that there could be no dispute that if, simultaneously with the imposition of a new tax, Congress granted an increase in salary which equaled or exceeded the tax, no diminution in the level of compensation just prior to imposition of the tax would have occurred. The mathematical result is the same as if the judge received either no salary increase or an increase in the amount of any excess of the raise over the tax. An increase subsequent to imposition of a new tax would have a similar effect prospectively.

2

Case law applying the Compensation Clause, U.S. Const. art. III, § 1, makes plain that Article III does not prohibit taxation of judges per se but only imposition of new taxes on sitting judges, *Hatter IV*, 64 F.3d at 650.

In *O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939), the Supreme Court held that a federal circuit judge who was appointed after federal income taxes had become effective may be taxed by Congress, and that such taxation did not violate the Compensation Clause. *O'Malley*, 307 U.S. at 282, 59 S. Ct. at 840.

The Federal Circuit recognized, *Hatter IV*, 64 F.3d at 650, that all taxes on federal judges are not unconstitutional:

> Because the claimants in *O'Malley* took office after Congress had made income taxes applicable to

judges' salaries, those judicial claimants suffered no diminishment in compensation after taking office. The tax was a pre-existing obligation factored into the new judges' compensation.

Plaintiffs concede that a general increase in federal income tax rates would not constitute a diminution for any judges currently in office.

3

We next explore the concept that Congress has no enforceable obligation to raise the salaries of judges and, consequently, whether judges receive any increase in compensation is a matter within the discretion of Congress.

In the Constitutional Convention of 1787 which drafted Article III, proposals were made and serious consideration given to prohibiting Congress from making any increase to the compensation of a judge once appointed. For discussions of various positions considered at the convention, *see United States* v. *Will*, 449 U.S. 200, 219-20, 101 S. Ct. 471, 482-83, 66 L.Ed.2d 392 (1980); *Atkins* v. *United States*, 214 Ct. Cl. 186, 217-221, 556 F.2d 1028 (1977), and *Hatter IV*, 64 F.3d at 651. Indeed, such a prohibition on increases as well as decreases in compensation was adopted with respect to the President. U.S. Const. art. II, § 1, cl. 6 ("The President shall . . . receive . . . a Compensation, which shall neither be increased nor diminished during the Period for which he shall have been elected. . . .").

It is reasonable to suppose that the Founders—who seriously debated whether *any* increase in the salaries of sitting judges should be permitted and agreed that

there should be none for a President between elections—assumed that Congress would be under no enforceable duty or obligation to raise judicial salaries. Rather, Congress was left with discretion to increase salaries when, in its wisdom, it chose to do so. The same Convention drafted and proposed simultaneously the Appropriations Clause, U.S. Const. art. I, § 9, cl.7 ("No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law. . . .").

The Supreme Court held in *Will*, 449 U.S. at 226-29, 101 S. Ct. at 486-88, that Congress may rescind a judicial salary increase provided in a statute so long as it does so before the increase becomes effective. "The Constitution delegated to Congress the discretion to fix salaries and of necessity placed faith in the integrity and sound judgment of the elected representatives to enact increases when changing conditions demand." *Id.* at 227, 101 S. Ct. at 487.

Earlier, the Court of Claims in *Atkins* v. *United States*, 214 Ct. Cl. 186, 221-28, 556 F.2d 1028 (1977), *cert. denied.*, 434 U.S. 1009, 98 S.Ct. 718, 54 L.Ed.2d 751 (1978), rejecting assertions by judges that their compensation had been unconstitutionally diminished by economic inflation, recognized that Congress has discretion to increase judicial salaries or to refrain from doing so if the absence of increases is not the result of an intent to discriminate against the judiciary. No such discriminatory intent is alleged in the instant case.

Congress has provided concerning judicial compensation, § 140 of Public Law No. 97-92, 95 Stat. 1183, 1200, December 15, 1981, that federal judges are not entitled to any salary increases "except as may be specifically authorized by Act of Congress."

4

In sum, applying the concepts under discussion, we conclude that when unlawful diminution of judicial compensation results from imposition of a new tax, as found by the Federal Circuit in *Hatter IV*, 64 F.3d at 653, that diminution is subject to setoff or cure by simultaneous or subsequent salary increases which Congress may, in its discretion, enact, it being under no enforceable obligation to grant any increase. Thus, if Congress mandates that federal judges pay a certain amount in a new tax but, at the same time, gives those judges a salary increase in an amount equal to or greater than the amount of the tax, then any diminution within the meaning of the Compensation Clause is immediately cured. This is what occurred with respect to plaintiffs.

The order of compensation events is obviously quite important. If Congress increased judicial salaries and thereafter took action (either a direct reduction in nominal salary or imposition of a new tax) resulting in a diminution of compensation, the earlier increase would have become part of constitutionally protected compensation adversely affected by the diminution. This is the essence of *Will*, 449 U.S. at 200, 101 S. Ct. at 473-74. On the other hand, if an increase in nominal salary occurred simultaneously with or subsequent to such a diminution, the simultaneous or subsequent increase accomplishes a cure to the extent of such increase. As illustrated below, this is the situation in this case with respect to OASDI taxes withheld for 1984 and subsequent years.

C

The first *Hatter* panel in the Federal Circuit implicitly recognized that Congress may restore any diminution that may have occurred. The court reasoned that "only a timely restoration of lost compensation would prevent violation of the Constitution's prohibition against diminution of judicial salaries." *Hatter II*, 953 F.2d at 628.

Similarly, in *Will*, the judge claimants apparently recognized a prospective cure after an unlawful salary reduction was restored. *Will*, 449 U.S. at 206, n.3, 101 S. Ct. at 476, n.3. There, in the first of four years at issue, Congress had made a retroactive direct reduction to nominal annual judicial salaries already in effect as of October 1, 1976, but then, effective on March 1, 1977, increased the salaries to a level which exceeded the October 1, 1976 level. *Id.* at 206, 101 S. Ct. at 476. The parties and the Court apparently assumed that the earlier unlawful reduction was cured prospectively as of the March 1, 1977 restoration.

D

Plaintiffs' position on damages is exactly the same as it would be if there had been no increase in nominal salary since December 31, 1983. In plaintiffs' analysis, the government gets no credit for any part of the increase in salary over the years. Neither does it get any credit for the Social Security benefit.

It is consistent with plaintiffs' position that if Congress awarded all judges a pay raise of $1,000,000 per year retroactive to January 1, 1983 but not specifically or expressly related to the Social Security taxes

imposed in 1983 and 1984, it would not cure the diminution resulting from imposition of the taxes. Under plaintiffs' theory, all Social Security taxes withheld must be refunded to plaintiffs and there can absolutely be no cure by subsequent increases in salary. Plaintiffs insist that only a payment specifically designated as a refund of or damages for the Social Security taxes withheld can satisfy the unconstitutional diminution found by the Federal Circuit.[9]

Plaintiffs' current position on cure represents a change of position for them. In both the original complaint, ¶ 18 at 5, and in the First Amended Complaint, ¶ 21 at 6, plaintiffs, after reciting imposition of OASDI taxes beginning on January 1, 1984, stated: "Either as a result of these deductions, *or as a result of defendant's failure to increase plaintiffs' salaries by the amount of these deductions*, defendant has diminished plaintiffs' compensation." (Emphasis added.) In the Second Amended Complaint, ¶ 23 at 6, plaintiffs made the identical statement concerning cure with respect to both OASDI taxes and HI taxes.

---

[9] At oral argument on damages issues conducted on March 7, 1997, the following colloquy occurred:

> THE COURT [to plaintiffs' counsel]: You do take the position that if the judges this year got a staggering raise, but no reasons [were] assigned for it, it would not stop the running of this diminution?
>
> [PLAINTIFFS' COUNSEL]: Absolutely. That is our position.

Transcript (3/7/97) at 10.

E

Plaintiffs argue that *Evans* v. *Gore*, 253 U.S. 245, 264, 40 S. Ct. 550, 556-57, 64 L.Ed. 887 (1920), which the Federal Circuit has held controlling in *Hatter IV*, 64 F.3d at 650, effectively precludes application of a cure concept as just discussed. *Evans* held that imposition of federal income taxes on federal judges constituted a diminution in violation of the Compensation Clause. Plaintiffs point out that the day after the income tax was enacted, Congress increased the compensation of federal judges by $1500, an amount significantly higher than the income tax withheld from the judges' salary. Plaintiffs thus assert that "there was no argument that the subsequent pay increase 'cured' this diminution." Pl. Reply Br. (1/16/97) at 8-9.

There are two defects in plaintiffs' assertion that the facts of *Evans* preclude cure as a matter of law. First, there was no discussion whatever of this issue in the *Evans* opinion. The Court made no mention of any salary increase subsequent to imposition of the tax on 1918 income by an Act of Congress adopted in 1919. Second, and more importantly, the facts of *Evans* involved income tax for the single year 1918, while the 1919 salary increase referred to by plaintiffs was not effective until March 1, 1919 and was prospective only. Pl. Reply Br. (1/16/97) at A19-A21. We would agree, on the *Evans* facts, that an unlawful reduction of income with respect to one calendar year is not cured by a non-retroactive salary increase, however large, in the next calendar year.

V

In calculating the diminution which resulted from the imposition of Social Security taxes, the fundamental first step is establishment of the compensation level entitled to protection from diminution. (Because, as explained below, all plaintiffs are time-barred from contesting the withholding of HI taxes in 1983, we address only the compensation level entitled to protection immediately prior to January 1, 1984, the effective date of the imposition of OASDI taxes.)

As of December 31, 1983, the nominal annual salary[10] of district judges was $73,100, and the nominal annual salary of circuit judges was $77,300. Consequently, pursuant to the Federal Circuit's holding in *Hatter IV*, those were the compensation levels entitled to protection from diminution by imposition of the OASDI tax on January 1, 1984.

Having determined that subsequent pay raises may cure prospectively a Social Security tax withholding for the same year to the extent the salary increase is equal to or larger than the Social Security tax withholding, we turn to the calculation of any actual diminution in plaintiffs' compensation.

A

For calendar year 1984, effective as of (retroactive to) January 1, district judges received an increase in

[10] In this context, "nominal annual salary" designates the stated lawful salary before deduction of federal and state income taxes, Social Security taxes and voluntary items such as life and health insurance premiums and survivor annuity premiums.

nominal annual salary of $2,900; circuit judges received a corresponding increase of $3,100.

The OASDI tax imposed on each plaintiff for calendar year 1984 was $2,041.20. Thus, the salary increase for each plaintiff over the 1983 compensation base more than offset the OASDI tax for 1984. (Although not relevant for present purposes, the 1984 salary increase more than offset the total of both OASDI and HI taxes for 1984.)

B

For calendar year 1985, effective as of January 1, district judges received an additional increase in nominal annual salary of $2,700 resulting in a cumulative adjustment of $5,600 over the base protected from diminution by OASDI taxes; circuit judges received a corresponding increase of $2,800 resulting in a cumulative adjustment of $5,900.

The OASDI tax imposed on each plaintiff for calendar year 1985 was $2,257.20. Thus, the cumulative salary increase over the 1983 base more than offset the OASDI tax for 1985. (Although not relevant for present purposes, the cumulative salary increase more than offset the total of both OASDI and HI taxes for 1985.)

C

As illustrated in the immediately preceding subpart, by calendar year 1985, the cumulative increase in nominal annual salary for both district and circuit judges exceeded the base protected from diminution by OASDI taxes by more than $4,000; these increases have

remained in effect. In contrast, the total of OASDI tax imposed on each plaintiff has never exceeded $4,000 in any calendar year. Thus, the cumulative salary increase over the 1983 base has more than offset the OASDI tax for each year from 1984 through 1996.

D

For 1986, although no increase to the nominal annual salary of any of the plaintiffs became effective, the cumulative increase over the protected base remained in effect, *i.e.*, $5,600 for district judges and $5,900 for circuit judges. The OASDI tax imposed on each plaintiff for calendar year 1986 was $2,394. Thus, the cumulative salary increase over the 1983 base more than offset the OASDI tax for 1986. (Although not relevant for present purposes, the cumulative increase more than offset the total of both OASDI and HI taxes for 1986.)

E

For calendar year 1987, district judges received an increase in nominal annual salary of $2,400 effective on January 1 and an additional increase of $8,400 effective on March 1, resulting in a cumulative adjustment of $16,400 over the base protected from diminution by OASDI taxes; circuit judges received corresponding increases of $2,500 and $9,300, resulting in a cumulative adjustment of $17,700.

The OASDI tax imposed on each plaintiff for calendar year 1987 was $2,496.60. Thus, the cumulative salary increase over the 1983 base more than offset the OASDI tax for 1987. (Although not relevant for pre-

sent purposes, the cumulative increase more than offset the total of both OASDI and HI taxes for 1987.)

F

As illustrated in the immediately preceding subpart, by calendar year 1987, the cumulative increase in nominal annual salary for both district and circuit judges far exceeded $6,000; these increases have remained in effect. In contrast, the total of Social Security taxes (OASDI and HI taxes) imposed on each plaintiff has never exceeded $6,000 in any calendar year. See Schedules A through D, Def.Br. (2/25/97) and Appendices B & C, Pl. Br. (11/12/96). Thus, the cumulative salary increase over the 1983 base has more than offset the total of both OASDI and HI taxes for each year from 1984 through 1996, and, consequently, no unlawful diminution in judicial compensation occurred during those years.

G

There were additional salary increases for both district and circuit judges effective on February 1, 1990 and on January 1 of 1991, 1992 and 1993.[11] As of January 1, 1993, the total nominal annual salary of district judges was (and remains) $133,600, and the corresponding salary of circuit judges was (and remains) $141,700. These most recent salary levels reflect a cumulative increase in nominal annual salary over the 1983 base protected from diminution by OASDI taxes ($73,100 for

[11] The increases in nominal annual salary for district judges were in the amount of $7,500 in 1990, $28,500 in 1991, $4,400 in 1992 and $4,100 in 1993. For circuit judges the increases were $7,100 in 1990, $30,200 in 1991, $4,600 in 1992 and $4,400 in 1993.

district judges and $77,300 for circuit judges) in the amount of $60,500 for district judges and $64,400 for circuit judges. These annual sums are more than ten times higher than the total of Social Security taxes withheld during any calendar year.

VI

We next address (1) the OASDI claims of the eight later-filing plaintiffs and (2) the claims of all plaintiffs based on imposition of HI taxes.

Resolution of these claims involves application of statutes of limitations together with two related issues: (1) whether the "relation-back" doctrine applies to claims of the later-filing judges and to new claims by the "original plaintiffs" first asserted in 1992, and (2) whether the "continuing claim" doctrine is applicable to the claims asserted in this case. Alternatively, application of the concept of cure discussed in Parts IV and V above has potential application to a complete resolution of these remaining claims.

A

Reference is made to Part I of this opinion for designation of the two statutes which resulted in imposition of Social Security taxes on federal judges and the effective date of each. Suffice it to say at this juncture that HI taxes became effective and were first withheld from judicial compensation on January 1, 1983, and that OASDI taxes became effective and were first withheld from judicial compensation on January 1, 1984.

Reference is further made to Subpart III A above for a statement of the timing of claim presentation and

appearance of plaintiffs in this litigation. Suffice it to say for limitations purposes that the eight later-filing judges first presented (or reasserted) their claims based on OASDI taxes in June and December 1992 (more than eight years after imposition of OASDI taxes on judges) and that all plaintiffs first presented claims based on imposition of HI taxes in December 1992 (more than nine years after imposition of HI taxes on judges).

B

A claim against the United States for damages is barred unless the complaint is filed within six years after the claim first accrued. 28 U.S.C. §§ 2401(a) & 2501.[12] A cause of action accrues "when all the events have occurred which fix the liability of the Government and entitle the claimant to institute an action," *Oceanic S.S. Co.* v. *United States*, 165 Ct. Cl. 217, 225 (1964), and "the plaintiff was or should have been aware of their existence," *Hopland Band of Pomo Indians* v. *United States*, 855 F.2d 1573, 1577 (Fed. Cir.1988). "A constitutional claim can become time-barred just as any other claim can. . . . Nothing in the Constitution requires otherwise." *Block* v. *North Dakota ex rel. Board of University & School Lands*, 461 U.S. 273, 292, 103 S. Ct. 1811, 1822, 75 L.Ed.2d 840 (1983). *See Lunaas* v.

---

[12] Title 28 U.S.C. § 2401(a) provides in pertinent part: "[E]very civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues."

Title 28 U.S.C. § 2501 provides in pertinent part: "Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues."

United States, 936 F.2d 1277, 1279-80 (Fed. Cir.1991), *cert. denied*, 502 U.S. 1072, 112 S. Ct. 967, 117 L.Ed.2d 132 (1992) (applying *Block* to bar suit based on Article VI of Constitution brought more than six years after accrual of claim).

The Supreme Court has stated that the "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Soriano* v. *United States*, 352 U.S. 270, 276, 77 S. Ct. 269, 273, 1 L.Ed.2d 306 (1957).

C

Based on this law, the critical initial matters for determination are the dates on which plaintiffs' claims for the two new taxes first accrued. Plainly, those dates are January 1, 1983 for HI taxes and January 1, 1984 for OASDI taxes, the effective dates of imposition of the taxes and the respective dates on which each tax was first withheld from plaintiffs' salaries.

A comparison of these claim accrual dates with the initial claim-presentation dates significantly exceeding six years from claim accrual leads inescapably to the conclusion that unless the claims can be deemed to relate back to a date within six years of initial accrual,[13] the claims are barred under the two controlling statutes of limitations.

---

[13] Unless the claims are deemed to relate back to a time within six years of first accrual or unless they are deemed to be "continuing claims," the six-year statutes of limitations would have run on HI claims on January 1, 1989 and on OASDI claims on January 1, 1990.

D

Plaintiffs argue that the claims of the later-filing judges asserted in the first and second amended complaints (June and December 1992) relate back to the claims in the original complaint (December 29, 1989) pursuant RCFC 15(c) and thus are timely. RCFC 15(c) provides: "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

The relation-back issue concerning OASDI taxation is different from the issue concerning HI taxation:

(a) To the extent of their OASDI claims, the later-filing plaintiffs were asserting the same cause of action as that set forth in the original complaint. Therefore, while there can be no question that the OASDI "claim . . . asserted in the amended pleading arose out of the . . . occurrence set forth . . . in the original" complaint, the relation-back problem of the later-filing judges is that they were not the same as the original plaintiffs. Though similarly situated, their position in the case is no different than it would be if each later-filing plaintiff had filed his own separate suit.

(b) To the extent of the HI claims first presented in the Second Amended Complaint, all plaintiffs are asserting a claim which did not arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading."

"The general rule . . . is that the rule of relation-back does not extend to amendments that add new parties or causes of action." *Snoqualmie Tribe of Indians* v. *United States*, 178 Ct. Cl. 570, 588, 372 F.2d 951, 961 (1967). We address these two relation-back issues separately.

E

The matter of potential relation back of HI claims may be dealt with succinctly. When these claims were broached by all plaintiffs in the Second Amended Complaint submitted almost ten years after first accrual, they were totally new diminution claims.

The diminution claims set forth in the original and the first amended complaints were emphatically and specifically based on imposition of OASDI taxes pursuant to legislation adopted in 1983. Although at the time of filing of the original complaint the HI tax (imposed pursuant to legislation adopted in 1982) had been in effect for almost one year, it was not mentioned. Consequently, the HI claims of all plaintiffs did not arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading," RCFC 15(c), and do not relate back to any date prior to December 11, 1992.

Interestingly, even if the HI tax claims of all plaintiffs were deemed to relate back to the original case filing date, those claims would still be time barred since the original filing date (December 29, 1989) was more than six years after the claims for HI taxes first accrued (January 1, 1983). Further, even if all HI taxes withheld from the salary of each judge during 1983 are viewed as having been withheld on the last salary

payment date for judges during calendar year 1983, that day would be December 1, 1983. Thus, in any event, the HI claims would still have been presented more than six years after they first accrued.[14]

We address in Part VII below whether plaintiffs' HI claims are continuing claims not time barred to the extent of taxes withheld after December 11, 1986, the commencement of the six-year period preceding presentation of the Second Amended Complaint. (However, alternatively, even if the claims are deemed continuing claims, any portion of such claim accruing after December 11, 1986 has been offset by salary increases, as explained in Parts IV and V above.)

---

[14] Plaintiffs suggest that the cause of action for diminution resulting from HI taxes did not first accrue until April 15, 1984. Pl.Br. (1/16/97) at 21-23; Transcript (3/7/97) at 16-21. Their position is grounded on 26 U.S.C. (I.R.C.) § 6513(c) which provides that *for purposes of 26 U.S.C. § 6511*, Social Security taxes with respect to one calendar year, if paid before April 15 of the following calendar year, are deemed paid and the corresponding returns are deemed filed on April 15 of such succeeding year. But 26 U.S.C. (I.R.C.) § 6511 establishes deadlines ("3 years from the time the return was filed or 2 years from the time the tax was paid") for administrative refund claims which must precede any court suit for tax refunds. *See* 26 U.S.C. (I.R.C.) § 7422(a).

Plaintiffs' position concerning accrual of HI claims is meritless for two reasons. First, the Federal Circuit has determined that the claims asserted in this litigation are not formal tax refund claims, *Hatter II*, 953 F.2d at 630; consequently sections 6511 and 6513(a) of the Internal Revenue Code simply have no application. Second if these tax code provisions controlled the accrual of plaintiffs' claim, the limitations period would have expired not later than April 15, 1987 (three years after the deemed return date for 1983 taxes), years before the filing date of the original complaint.

F

We next address the relation-back issue with respect to assertion of OASDI claims by the later-filing plaintiffs. As stated in Subpart VI D above, the issue with respect to OASDI taxes is whether or under what circumstances new parties may be added to a case and obtain the benefit of the original filing date. The general rule is that amendments which add new parties do not relate back. We must explore whether the later-filing plaintiffs qualify for an exception to the rule.

A recent circuit court of appeals pronouncement on amendments seeking to add parties to a complaint asserting a claim on which the controlling statute of limitations has expired is as follows:

> An amendment adding a party plaintiff relates back to the date of the original pleading only when: 1) the original complaint gave the defendant adequate notice of the claims of the newly proposed plaintiff; 2) the relation back does not unfairly prejudice the defendant; and 3) there is an identity of interests between the original and newly proposed plaintiff.

In re Syntex Corp. Securities Litigation, 95 F.3d 922, 935 (9th Cir. 1996) (citing *Besig* v. *Dolphin Boating & Swimming Club*, 683 F.2d 1271, 1278-79 (9th Cir. 1982)).

Court of Claims case law makes plain that in suits against the United States, the "identity of interests" requirement depends on representational relationships among the original and newly proposed parties, not on

merely being similarly situated with respect to the claim in the original pleading.

Here, even if it could be said that the original timely complaint gave the government adequate notice of the OASDI claims of the later-filing judges, and even if it could further be said that relation back of the OASDI claims of the later-filing plaintiffs would not unfairly prejudice the government, the later-filing judges do not share the requisite "identity of interests" with the original plaintiffs.

This issue was addressed by the Court of Claims in *Snoqualmie Tribe of Indians*, 178 Ct. Cl. at 585-89, 372 F.2d at 959-61. In that case, the Snoqualmie Tribe brought an action against the United States based upon alleged inequity in a treaty with various Indian tribes. After suit was filed, the Snoqualmie Tribe realized that the original petition should have included a claim on behalf of the Skykomish Tribe, since it appeared that the Skykomish tribe either had been a subgroup of the Snoqualmie Tribe at the time the treaty was made or had merged with the Snoqualmie Tribe thereafter through intermarriage. *Id.* at 574, 372 F.2d at 953. The Snoqualmie plaintiff sought to amend its complaint to include a claim on behalf of the by then extinct Skykomish Tribe, but the five-year limitations period had expired. *Id.* at 585, 372 F.2d at 959. Thus, the court was required to resolve whether the amendment would be allowed to relate back to the original pleading, avoiding the statute of limitations.

After first announcing the general rule that the doctrine of relation-back does not extend to amendments that add new parties, *Id.* at 588, 372 F.2d at 961, the Court of Claims found that there existed a unique

connection between the Snoqualmie Tribe and the Skykomish Tribe, the former being the "corporate representative" of the latter in that case. *Id.* at 582, 372 F.2d at 958. Thus, the court held that the Skykomish claim could relate back to the original Snoqualmie claim. *Id.* at 588-89, 372 F.2d at 961. The court reasoned that "on our theory of representation there is no new party added by amendment. The Snoqualmie Tribe is the only claimant; it is simply an entity serving in two representative capacities." *Id.* at 588, 372 F.2d at 961. The court further explained that "we would have greater difficulty allowing the amendment if we thought it was brought by an entirely unrelated party even though it arose out of the same transaction." *Id.* at 589, 372 F.2d at 961.

This requirement of representative relationship in order for an amendment adding new parties to relate back was reaffirmed by the Court of Claims in *Baldwin Park Community Hospital* v. *United States*, 231 Ct. Cl. 1011, 1982 WL 25837 (1982). In that case, an original hospital plaintiff filed an amended petition in which thirty-six hospital plaintiffs with similar claims were added several months after the original petition was filed. *Id.* 231 Ct. Cl. at 1011. (It does not appear whether a limitations period had expired in the interim, but the court treated the difference in filing dates as significant.) The defendant argued that the new plaintiffs should not enjoy the benefit of the original petition's filing date pursuant to a relation-back rule identical to RCFC 15(c). The Court of Claims found that the new plaintiffs were operated and owned either directly or through subsidiary corporations by the original plaintiff, or by a company to which the original plaintiff was the legal successor in interest. On the

basis of this representative relationship (common corporate ownership of the hospitals), the court allowed the new plaintiffs to relate their similar claims back to the original complaint's filing date. *Id.* at 1012. The requisite "identity of interests" was satisfied in that circumstance. *See generally*, *Custer* v. *United States*, 224 Ct. Cl. 140, 154-55, 622 F.2d 554, 563, *cert. denied*, 449 U.S. 1010, 101 S. Ct. 565, 66 L.Ed.2d 468 (1980) (denying relation back to original filing date by a new party alleging same claim).

Recently, this court applied Court of Claims precedent concerning the relation-back doctrine to facts similar to those in the case at bar. *Creppel* v. *United States*, 33 Fed. Cl. 590 (1995). In 1991, shortly before expiration of the six-year statute of limitations, landowners filed several related suits (consolidated by the court) alleging takings. After the limitations period had expired, the original plaintiffs moved to add 43 new plaintiffs who owned land affected by the alleged takings. The court found that, even assuming that the claims of the new plaintiffs arose out of the same transaction or occurrence that gave rise to the original complaints, there was no corporate or other legal relationship between the new and the original plaintiffs. *Creppel*, 33 Fed. Cl. at 596. The court stated:

> The identity of interest between the original and proposed new plaintiffs is limited to geographic proximity—the fact that all landowners, at the time of the alleged taking, owned property within [the affected site]. The geographic proximity of a discrete parcel of land to property owned by plaintiffs asserting a takings claim is not enough.

Id. Finding no "formal connection" between the original plaintiffs and the proposed new plaintiff, the court held that the new plaintiffs could not relate their claims back to the filing date of the original complaints. Thus, their claims were barred by the statute of limitations.

Turning to the case at bar, there is no formal connection or representational relationship among the original and the later-filing judges. In essence, each judge is suing individually for diminution of his personal compensation.

Plaintiffs' interpretation of the relation-back doctrine would allow unrelated parties, after expiration of the limitations period, to obtain the benefit of a timely filed complaint so long as the same governmental action caused their damages. Under this approach, plaintiffs with common grievances could evade the statute of limitations as a matter of course by merely adding themselves to a timely filed complaint at any time after the expiration of the statute of limitations. We do not believe that this would be consistent with congressional intent and controlling precedent dealing with statutes of limitation and relation back.

It would be anomalous if the later-filing judges in this civil action were deemed timely by application of the relation-back rule when other judges who filed a separate suit on the same day alleging an identical cause of action for diminution would be deemed untimely.

Based on the foregoing, we conclude that the OASDI claims of the later-filing judges, all first presented more than six years after first accrual, do not relate back to

the timely filing date of the original complaint and that, consequently, those claims are barred.

We address in Part VII below whether the later-filing plaintiffs' OASDI claims are continuing claims not time barred to the extent of taxes withheld after June and December 1986, the commencement months of the six-year periods preceding presentation of the First and Second Amended Complaints. (However, alternatively, even if the claims are deemed continuing claims, any portion of such claim accruing after June 1986 has been offset by salary increases, as explained in Parts IV and V above.)

VII

The next issue for resolution is whether the diminution claims are "continuing claims" so that even if some were not presented within six years of the time of first accrual, they may nonetheless be maintained with respect to damages accruing within the six-year period preceding presentation. (The issue was raised by defendant in connection with HI taxes, Def. Br. (2/25/97), p. 6 n.3, presumably because no plaintiff submitted a timely claim for HI taxes. The issue is equally applicable to OASDI claims of the later-filing plaintiffs.)

A

The continuing claim doctrine provides that when the government owes a plaintiff a continuing, recurring duty to make payments of money, a new cause of action arises with each breach of that duty. *Tabbee* v. *United States*, 30 Fed. Cl. 1, 5 (1993) and cases therein cited. *See generally Friedman* v. *United States*, 159 Ct. Cl. 1, 310 F.2d 381 (1962), *cert. denied sub nom. Lipp* v.

United States, 373 U.S. 932, 83 S. Ct. 1540, 10 L.Ed.2d 691 (1963). *See especially Acker* v. *United States*, 23 Cl. Ct. 803, 804-06 (1991), for history and analysis of the doctrine. Under that doctrine, each incident of withholding an installment of an obligation to make continuing payments gave rise to a new claim for damages. The continuing claim doctrine prevented a statute of limitations from shielding an offender in an ongoing wrongdoing, and protected recurring claims that might otherwise be barred if based upon events occurring more than six years prior to suit.

B

However, application of the continuing claim doctrine was rejected by the Federal Circuit in *Hart* v. *United States*, 910 F.2d 815 (Fed. Cir. 1990). There the widow of a military retiree filed suit seeking to recover Survivor Benefit Plan annuity payments due after her husband's death. The suit was filed more than six years after the death of her husband, upon which date she became eligible to receive the benefits. *Id.* at 816.

Even though her suit was filed more than six years after her husband's death, plaintiff in *Hart* urged the court to apply the continuing claim doctrine. She argued that she had a new claim each month for an annuity installment payment and that her claim as to that amount "first accrued" on the first day of each month. *Id.* at 818. The Federal Circuit rejected her argument. The court reasoned that applying the continuing claim doctrine would mean that "the statute of limitations would never run in a claim such as this one, with respect to the six years of benefits preceding the filing of suit and thereafter." *Id.* The court continued: "Because all events necessary to her benefits claim had

occurred when her husband died, we conclude that plaintiff's claim for . . . annuity benefits is not a 'continuing' claim." *Id.*

The Federal Circuit reasoned: "Exceptions cannot be engrafted on the statute of limitations so as to allow claims to be asserted beyond the six year time limit set forth in Section 2501. . . . Only Congress can lengthen the time period for bringing suit against the United States." *Id.* at 817. "Congress has not chosen to extend the time limit for suits such as this one." *Id.* at 819. *See Sankey* v. *United States*, 22 Cl. Ct. 743, 746 (1991), *aff'd*, 951 F.2d 1266 (Fed. Cir. 1991) (stating, based on *Hart*, 910 F.2d 815: "this court no longer recognizes the continuing claim doctrine"); *but see Acker*, 23 Cl. Ct. at 804-06 (recognizing that the continuing claim doctrine "may be analytically suspect" and "is not readily reconciled with the wording of the statute of limitations," but holding that *Hart* "cannot be interpreted to invalidate the continuing claim doctrine" because *Hart* was not an *en banc* decision that could overrule Court of Claims precedent).

C

Likewise, in a more recent case, *Fallini* v. *United States*, 56 F.3d 1378 (Fed. Cir. 1995), *cert. denied*, 517 U.S. 1243, 116 S. Ct. 2496, 135 L.Ed.2d 189 (1996), the Federal Circuit refused to apply the continuing claim doctrine to salvage damages for the last six years of an alleged ongoing taking effected by legislation. The *Fallini* plaintiffs contended that the government had engaged, since 1971, in a continuing course of taking in violation of the Fifth Amendment by requiring them to provide water to wild horses when plaintiffs provided water to their domestic livestock on federal land. As

alleged, the takings resulted from enactment in 1971 of a statute which compelled plaintiffs to provide water to the federally-protected wild horses; plaintiffs sought recovery for alleged injuries they suffered within six years prior to the filing of their suit in 1992.

The Federal Circuit found it unnecessary to address the merits of the case, instead holding that the suit was untimely. *Id.* at 1380. The court, after stating the usual rule that "a cause of action accrues when all the events have occurred that fix the defendant's alleged liability and entitle the plaintiff to institute an action," *id.*, observed that the plaintiffs had "been cognizant of the facts underlying the alleged taking since long before they filed their complaint," since the alleged taking resulted from legislation enacted in 1971. *Id.* The court held that "for purposes of claim accrual, such a taking occurs on the date of enactment of the legislation." *Id.* at 1382-1383.[15]

D

Based on the case authority examined in this Part VII, we conclude that none of the claims asserted in this case are "continuing" claims within the meaning of the former continuing claim doctrine. On the one hand,

---

[15] In its discussion of the nature of the *Fallini* plaintiffs' taking claim, the court said: "If the horses were agents or instrumentalities of the United States government, the analysis of what governmental action constituted the alleged taking *might* well be different." *Fallini*, 56 F.3d at 1383 (emphasis added). This statement would appear to have no application to claims, as in the case at bar, in which the unlawful diminution, *i.e.*, the imposition of two new taxes on sitting judges, *Hatter IV*, 64 F.3d at 652, was accomplished by discrete legislative enactments which had an immediate impact.

the unlawful diminution consisted of imposition of two new taxes on specific effective dates; on the other hand, even if plaintiffs took the position that a new claim arose with each instance of withholding of HI and OASDI taxes, the holding in *Hart*, 910 F.2d 815, would prohibit recovery for any such recurring claim not asserted within six years of the initial effective date of each new tax.

This holding has potential, alternative impact on the HI tax claims of all plaintiffs and the OASDI claims of the later-filing plaintiffs, since those claims were first presented more than six years after first accrual. Based on our conclusions in Parts IV and V above concerning offset resulting from salary increases, the claims just described would not result in recovery of damages even if they could be addressed as continuing claims.

VIII

Plaintiffs claim entitlement to compounded interest on any damages. The government objects to any award of interest and further argues that even if interest is awardable, it should be simple, not compounded. The threshold issue, then, is whether plaintiffs are entitled to recover interest on a claim under the Compensation Clause of the Constitution. All parties agree that this is an issue of first impression.

The general rule is that a successful plaintiff may not obtain interest on a claim against the United States unless Congress has expressly waived its sovereign immunity on interest by contract or statute. *Library of Congress* v. *Shaw*, 478 U.S. 310, 317, 106 S. Ct. 2957, 2962-63, 92 L.Ed.2d 250 (1986) ("In creating the Court

of Claims, Congress retained the Government's immunity from awards of interest, permitting it only where expressly agreed to under contract or statute.") *See generally* 28 U.S.C. §§ 1961 & 2516, 41 U.S.C. § 611.

A

Under existing case law, the only exceptions to this general rule pertain to awards of compensation under the Fifth Amendment takings clause.[16] That clause requires "just compensation" to one whose property has been taken by the government for public use.

The seminal case authorizing an award of interest in addition to an award for the value of property taken by the government is *Seaboard Air Line Ry.* v. *United States*, 261 U.S. 299, 43 S. Ct. 354, 67 L.Ed. 664 (1923). In *Seaboard*, the government took possession of private land to provide storage space for Army supplies pursuant to an Act of Congress. The Act did not authorize an award of interest. The Supreme Court stated: "Just compensation is provided for by the Constitution and the right to it cannot be taken away by the statute." *Seaboard*, 261 U.S. at 304, 43 S. Ct. at 356. The Court determined that just compensation "means substantially that the owner shall be put in as good position

[16] The Fifth Amendment of the U.S. Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V.

The requirement of 28 U.S.C. § 1498 that awards for unauthorized use of intellectual property be "reasonable and entire" has been construed to be a Congressional authorization of interest, *Waite* v. *United States*, 282 U.S. 508, 51 S. Ct. 227, 75 L.Ed. 494 (1931), and Fifth Amendment principles control application of the statute, *see ITT Corp.* v. *United States*, 17 Cl. Ct. 199, 232-33 (1989).

pecuniarily as he would have been if his property had not been taken." *Id.*

The Court approved an award of interest under these circumstances. "The only question here is whether payment at a subsequent date of the value of the land as of the date of taking . . . is sufficient to constitute just compensation." *Id.* at 305, 43 S. Ct. at 356. The Court held: "Where the United States . . . [takes land], the owner is not limited to the value of the property at the time of the taking; he is entitled to such addition as will produce the full equivalent of that value paid contemporaneously with the taking." *Id.* at 306, 43 S. Ct. at 356.

The Supreme Court has repeatedly recognized entitlement to interest in Fifth Amendment takings cases in the absence of specific congressional authorization. *See Shoshone Tribe of Indians* v. *United States*, 299 U.S. 476, 497, 57 S. Ct. 244, 251-52, 81 L.Ed. 360 (1937) ("the right to interest or a fair equivalent, attaches itself automatically to the right to an award of damages"); *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106, 125, 44 S. Ct. 471, 475, 68 L.Ed. 934 (1924); *United States* v. *Rogers*, 255 U.S. 163, 168-69, 41 S. Ct. 281, 281-82, 65 L.Ed. 566 (1921).

B

The critical factor enabling a takings plaintiff to obtain interest without specific congressional allowance is that the source of the claim is the Constitution. Indeed, consistent with the general rule, the Supreme Court has held that no interest is allowed if a claimant's cause of action if founded on a "just compensation" statutory provision rather than the Constitution.

United States v. *Alcea Band of Tillamooks*, 341 U.S. 48, 71 S. Ct. 552, 95 L.Ed. 738 (1951). In *Tillamooks*, the Court denied interest on compensation awarded for taking of original Indian title by the government, where the recovery by the Indians was not grounded on the Fifth Amendment, but on a statute. *Id.* The Court stated that the no-interest rule "precludes an award of interest even though a statute should direct an award of 'just compensation' for a particular taking." *Id.* at 49, 71 S. Ct. at 552. The Court then held that "the only exception arises when the taking entitles the claimant to just compensation under the Fifth Amendment. Only in such cases does the award of compensation include interest." *Id.* (quoting *Seaboard*, 261 U.S. 299, 43 S. Ct. 354).

C

Defendant argues that the "Just Compensation Clause" of the Fifth Amendment and the "Compensation Clause" in Article III of the Constitution serve entirely different purposes and use the term "compensation" in different senses. Assuming the accuracy of this position, it is irrelevant.

Resolution of the interest issue should not turn on whether the term "compensation" means the same thing in the Just Compensation Clause as in the Compensation Clause. Rather, the common denominator is that both clauses are contained in the Constitution.

We find no principled basis to distinguish the constitutionally based entitlement to interest of takings plaintiffs from the constitutional position of federal judges. Both the Fifth Amendment and Article III affirmatively require the payment of compensation. If

recompense for delay in compensation is required for takings claimants despite the general rule, surely the federal judge whose constitutionally protected compensation is delayed is at least equally entitled to such recompense.

Indeed, for two reasons, there is a sounder basis for interest on delayed compensation protected under Article III than on just compensation guaranteed by the Fifth Amendment.

First, the language of Article III specifically requires that judicial compensation be paid "at stated Times," U.S. Const. art. III, § 1. In practical terms, how is a violation of that provision to be corrected other than by interest for the period of delay in compliance. In contrast, there is no specific language in the Fifth Amendment's takings provision concerning timing of just compensation, and entitlement to interest depends on interpretation of the term "just compensation."

Second, the primary purpose of the Compensation Clause is to maintain the independence of the federal judiciary. *United States* v. *Will*, 449 U.S. 200, 217, 101 S. Ct. 471, 481-82, 66 L.Ed.2d 392 (1980); *O'Malley* v. *Woodrough*, 307 U.S. 277, 284, 59 S. Ct. 838, 840-41, 83 L.Ed. 1289 (1939); *Hatter IV*, 64 F.3d at 649; *Atkins* v. *United States*, 214 Ct. Cl. 186, 228, 556 F.2d 1028 (1977). Denying interest on an award to compensate for its violation would plainly threaten that independence; Congress would then be free to delay indefinitely payment of the principal amount of protected compensation leaving the judges with no remedy for the delay.

D

We conclude that judges whose compensation has been diminished in violation of Article III are entitled to reasonable interest on the principal amount of such diminution.

E

Once the determination has been made in constitutional cases that interest is required or appropriate, the rate of interest, whether interest shall be simple or compounded and the frequency of compounding are matters within the broad discretion of the trial court. *See Miller* v. *United States*, 223 Ct. Cl. 352, 399-400, 620 F.2d 812, 837 (1980).

Plaintiffs have specifically requested that the 52-week Treasury bill rate compounded annually be used with respect to any damages awarded. This request is most reasonable, *cf. Hughes Aircraft Co.* v. *United States*, 31 Fed. Cl. 481, 494 (1994), *aff'd*, 86 F.3d 1566, 1575 (Fed. Cir. 1996), *vacated on other grounds*, —— U.S. ——, 117 S. Ct. 1466, 137 L.Ed.2d 680 (1997), and interest shall be awarded substantially as requested. See Part IX below for the precise expression of the interest awarded.

IX

Based on all the foregoing, it is ORDERED that:

1. Judgment in the principal amount of $328.95, plus interest from January 1, 1984 to date of payment (calculated as described below), shall be entered in favor of each of the following seven plaintiffs: (a) District Judge TERRY J. HATTER, JR.; (b) MARY MARTIN ARCENEAUX, on behalf of the late Judge George Arceneaux, Jr.; (c) District Judge PETER H. BEER; (d) DOLORES LEE BURCIAGA, executrix of the estate of District Judge Juan G. Burciaga, deceased; (e) District Judge A.J. MCNAMARA; (f) District Judge RAUL A. RAMIREZ; and (g) District Judge THOMAS A. WISEMAN, JR.

2. Judgment in the principal amount of $347.85, plus interest from January 1, 1984 to date of payment (calculated as described below), shall be entered in favor of Circuit Judge HARRY PREGERSON.

3. Judgment with respect to the remaining eight plaintiffs shall be entered in favor of the defendant.

4. Interest awarded above shall be calculated at the 52-week Treasury bill rate described in 28 U.S.C. § 1961(a). The rate during any calendar year shall be that determined for the last auction of such bills next preceding January 1 of such calendar year. Interest shall be compounded annually as of January 1 of each year.

5. Each party shall bear its own costs.

APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 97-5093

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., DOLORES LEE BURCIAGA, EXECUTRIX OF THE ESATE OF JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER, AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFF-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

[Aug. 5, 1999]

ORDER

Before: PLAGER, Circuit Judge, ARCHER, Senior Circuit Judge, and RADER, Circuit Judge.

PLAGER, Circuit Judge.

Terry J. Hatter, Jr., et al. appeal the damages calculation of the Court of Federal Claims, *Hatter* v. *United States*, 38 Fed. Cl. 166 (1997) (*Hatter VI*), on remand from this court's decision in *Hatter* v. *United States*, 64 F.3d 647 (Fed. Cir. 1995) (*Hatter IV*).[1] In *Hatter IV*, we held that the Compensation Clause of the United States Constitution, art. III, § 1, forbids diminishment of the compensation of Article III judges once in office and that the imposition of social security taxes on a judge's pay after taking office unconstitutionally diminishes the judge's compensation. Because the Court of Federal Claims improperly calculated the damages award due to the diminution, we reverse and remand the matter for further proceedings.

BACKGROUND

The facts of this case have been discussed in detail in our previous two decisions, *Hatter IV* and *Hatter II*. The pertinent facts are that the Hospital Insurance (HI) tax (*i.e.*, Medicare) was imposed upon federal judges for the first time on January 1, 1983, pursuant to the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 278(a), 96 Stat. 324, 559 (1982) (codified as amended at 26 U.S.C. (I.R.C.) § 3121(u) (1988)). The Old Age Survivors and Disability Insurance tax (OASDI) was first imposed upon federal judges on January 1, 1984, pursuant to the Social

---

[1] The history of this case involves the following six decisions: *Hatter* v. *United States*, 21 Cl. Ct. 786 (1990) (*Hatter I*), *Hatter* v. *United States*, 953 F.2d 626 (Fed. Cir. 1992) (*Hatter II*), *Hatter* v. *United States*, 31 Fed. Cl. 436 (1994) (*Hatter III*), *Hatter* v. *United States*, 64 F.3d 647 (Fed. Cir. 995) (*Hatter IV*), *United States* v. *Hatter*, 519 U.S. 801, 117 S. Ct. 39, 136 L.Ed.2d 3 (1996) (*Hatter V*), and *Hatter* v. *United States*, 38 Fed. Cl. 166 (1997) (*Hatter VI*).

Security Amendments of 1983, Pub. L. No. 98-21, § 101(a)(1), (b)(1) and (d), 97 Stat. 65, 68, 69 (codified as amended at 26 U.S.C. (I.R.C.) § 3121(b)(5)(E) (1988) and 42 U.S.C. § 410(a)(5)(E) (1988)). The plaintiff judges asserted that their compensation was diminished in violation of the Compensation Clause, U.S. Const., art. III, § 1.

In *Hatter I*, the Court of Federal Claims dismissed the judges' claim for lack of jurisdiction, viewing it as a tax refund claim. We reversed in *Hatter II*, holding that the judges' claim was under the Compensation Clause for money damages. On remand, the Court of Federal Claims in *Hatter III* again dismissed the judges' claim, holding that there was no constitutional diminution because the taxes imposed were nondiscriminatory and generally applicable to the public. We reversed that judgment in *Hatter IV*. We held that the judges' compensation had been unconstitutionally diminished by taxes imposed after they took office and remanded the case for calculation of damages for sums improperly withheld. The Supreme Court granted certiorari; our judgment was affirmed in *Hatter V* due to lack of a quorum.[2]

On remand, the Court of Federal Claims awarded damages only to the eight original judges[3] who were

[2] The absence of a quorum resulted from recusals, presumably by Justices who could be affected by the outcome of the case. The members of the panel of this court who decided the earlier appeals and who are participating in this decision were all appointed subsequent to the events, and thus are not affected by the outcome.

[3] We follow the designation of the Court of Federal Claims, which referred to the plaintiffs filing the original complaint as the "original" judges and those who-joined or rejoined (after not

parties to the original complaint filed on December 29, 1989. Moreover, damages were limited to the amount of OASDI taxes withheld in January 1984 for services rendered in December 1983, before the period covered by the retroactive 1984 salary increase. The 1984 and subsequent pay raises of the judges were determined by the court to be more than sufficient to offset the OADSI taxes imposed in subsequent years. All other claims for damages, *i.e.*, the OASDI claim of the later-filing judges and the later-filed HI claim of all the judges, were denied.

The Court of Federal Claims determined that the continuing claim doctrine did not apply to the judges' salary payments and, as a result, the OASDI claims of the later-filing judges and the HI claims of all the judges were barred by the statute of limitations. The court also determined that, even if the continuing claim doctrine could be applied to the judges' salary payments, salary increases had more than offset any compensation diminution caused by the imposition of OASDI and HI taxes during the six-year limitations period.

DISCUSSION

As a preliminary matter, the judges assert that *Hatter VI* "did not implement [the] mandate" of *Hatter IV* because the Court of Federal Claims reconsidered

joining the appeal of *Hatter I*) the amended complaints as the "later-filing" judges.

the question of whether the social security taxes effected a diminution in salary. In *Hatter IV*, we stated:

> Social Security taxes diminish the compensation of Article III judges who took office prior to enactment of the taxes. This court therefore reverses and remands the case for tax refunds or recoveries *for the sums improperly withheld* from the claimants' salaries.

Hatter IV, 64 F.3d at 653 (emphasis added). That language is clear. We determined that a new tax on a sitting Article III judge effected an unlawful diminution of that judge's compensation. Having decided the liability question, the remand was for the purpose of ascertaining the damages for that violation, *i.e.*, "for the sums improperly withheld."

The controlling question in this appeal is whether the Government is correct that an unconstitutional diminution in the compensation of a group of judges, resulting from a tax unlawfully applied, may be fully offset by any and all future salary increases generally granted to the judiciary. The Government's position was adopted by the trial court.

We conclude that the Government's argument is fundamentally flawed, and results in a trivialization of the constitutional protection accorded judges by Article III, § 1, the Compensation Clause.[4] The consequence of

---

[4] The extent of the trivialization is illustrated by the damage award made by the trial court: the judges alleged that their out-of-pocket losses from the unconstitutional imposition varied between $20,000 to $56,000, with an average of about $47,000; the trial court's judgment awarded a total of $329 to the district judges and $348 to the appellate judge, plus interest.

the Government's argument subverts the very purpose of the Compensation Clause, and is wrong, both in law and in policy.

1.

The purpose of the Constitution's Compensation Clause—federal judges shall receive "a Compensation, which shall not be diminished during their Continuance in Office"—is to protect and preserve the independence of the judiciary. This purpose, and the reasons for this salutary protection of judicial independence, are well understood and well documented. A reader unfamiliar with the literature on the subject will find a thorough introduction to the matter in the Supreme Court's seminal opinion in *Evans* v. *Gore*, 253 U.S. 245, 40 S. Ct. 550, 64 L.Ed. 887 (1920).[5]

To understand the significance of this issue, it is necessary to put it in its historical context. The Administrative Office of the U.S. Courts uses 1969 as the benchmark for measuring changes in judicial salaries; that was the year that the first Quadrennial Salary Commission's recommendations were substantially implemented by Congress and the President. The Quadrennial Salary Commission was created in an attempt to take the salaries of the judiciary, Congress, and senior executive officials out of politics, and to base salary increases for these officials on cost-of-living changes

---

[5] *See also United States* v. *Will*, 449 U.S. 200, 101 S. Ct. 471, 66 L.Ed.2d 392 (1980); *O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939); *Miles* v. *Graham*, 268 U.S. 501, 45 S. Ct. 601, 69 L.Ed. 1067 (1925).

similar to those granted to General Schedule federal employees. As the history since 1969 illustrates, the attempt failed.[6]

Since 1969, with a few notable exceptions, judicial salaries have not kept pace with annual increases in inflation. Overall, measured in terms of purchasing power, judges' salaries have declined since 1969 by more than 23 percent. This did not happen as a result of actions by Congress directly reducing the compensation of judges, in which case it would have been remediable under the Constitution. Rather, it results from the political environment in which annual Congressional appropriations of funds for the judiciary occur.

For budgeting purposes, judges' salaries are tied to salaries of elected officials, including those of Congress. Because Congress rarely grants itself salary increases, the judiciary rarely receives increases, even those promised and scheduled as cost-of-living adjustments. The history of the linkage between congressional salaries and judicial salaries is long and complicated. Simply put, Title 2, U.S.C. § 135 (for district judges; similar provisions apply to the compensation of other Article III judges) ties judicial salaries to Section 205 of Title 2. Section 205, the "Adjustment Act," provides for an annual cost-of-living salary adjustment for judges, members of Congress, and Executive Schedule officials

---

[6] *Atkins* v. *U.S.*, 214 Ct. Cl. 186, 556 F.2d 1028 (Ct. Cl. 1977), was an unsuccessful attempt to force the Government to address the destructive effect of inflation on the judiciary during the period 1969—1975, when the value of the dollar, measured by the Consumer Price Index, decreased by 34%, and Congress failed to provide increases to protect judges' purchasing power.

when the rates of pay of employees under the General Schedule are adjusted for inflation; the Ethics Reform Act of 1989, Pub. L. No. 101-194, 103 Stat. 1716, keyed the adjustment to the index known as the Employment Cost Index—ECI.

Congress made a valiant effort in connection with the 1989 Ethics Reform Act to play catch-up. Salaries of top government officials, and judges, which for years had been lagging behind inflation, were adjusted in the amount of 7.9% in 1990 and 29.5% in 1991. This was followed in 1992 and 1993 by the promised annual inflationary adjustments pursuant to the Adjustment Act, and as indicated by the ECI. Since then, in every fiscal year (except one, 1994), General Schedule employees have had their salaries adjusted in response to increases in the ECI; however, in every fiscal year (except one, 1998), Congress, dealing with its own political concerns, denied the promised similar adjustment to judges.

Thus, despite occasional gains, judges' salaries remain substantially behind the cost-of-living index, even taking into account the recent relatively modest increases in inflation. The issue is hardly the dollar cost of the needed adjustment in judicial salaries—the entire judiciary budget constitutes two-tenths of one percent (0.2%) of the annual budget of the Federal Government, and the salaries of Article III judges constitute only seven percent (7%) of the annual judiciary budget. Fairness to the judiciary, and the protection of its quality and independence, would come at a very small cost in dollars.

This brief review of the recent history of judicial compensation policy highlights the wisdom of the

founders in including in Article III the express provision for protection of judicial salaries. In the larger view, it behooves the Government to ensure that that protection has real meaning, since the judiciary's ability to function as an independent judiciary is a cornerstone of the people's freedom. Professor Katzmann, in his recent book, stated the point well:

> This relationship [between the federal judiciary and Congress] shapes the administration of justice in critical ways. What is at issue in part is the integrity of political institutions: the judiciary needs to function in an environment respectful of its core values and mission, with the requisite resources; and the legislative branch seeks a judicial system that faithfully interprets its laws and efficiently discharges justice. But a goal even greater than the well-being of particular branches of government is at stake: the preservation of the means by which justice is dispensed fairly and efficiently.[7]

2.

The Supreme Court has had several occasions to expound on the law of the Compensation Clause and on those occasions has established the following propositions. The imposition of a new federal tax that has the effect of reducing the judicial compensation of judges already in office is unconstitutional. *See Evans* v. *Gore*, 253 U.S. 245, 40 S. Ct. 550, 64 L.Ed. 887 (1920). However, an income tax levied against the judicial salary of judges who took office after the levy is in effect is constitutional, when the taxing measure is of general,

[7] Robert Katzmann, Courts and Congress 1 (Brookings Institution Press 1997).

non-discriminatory application to all earners of income. *See O'Malley* v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939). In addition, though Congress may not rescind a salary increase for judges once it has gone into effect—that would be a diminishment of compensation—Congress is under no constitutional obligation to grant salary increases. *See United States* v. *Will*, 449 U.S. 200, 101 S. Ct. 471, 66 L.Ed.2d 392 (1980); *see also Atkins* v. *United States*, 214 Ct. Cl. 186, 556 F.2d 1028 (Ct. Cl. 1977).

The question before us is one not yet presented to the Supreme Court, or previously to this court. We earlier held, consistent with *Evans*, and now law of this case, that the imposition in 1983 on federal judges then in office of entirely new taxes—the OASDI and HI taxes—is unconstitutional. The question before us now is, what is the remedy for this unconstitutional imposition, as a result of which these judges have had withheld from their judicial salaries sums of money to which they are lawfully entitled.

The theory of the Government led the trial court to declare that:

> if Congress mandates that federal judges pay a certain amount in a new tax but, at the same time, gives those judges a salary increase in an amount equal to or greater than the amount of the tax, then any diminution within the meaning of the Compensation Clause is immediately cured. This is what occurred with respect to plaintiffs.

Hatter VI, 38 Fed. Cl. at 172. The Government's theory of the case, that the judges sustained little if any damages from this unconstitutional imposition because

whatever losses they sustained were offset by later general salary increases, is fundamentally flawed.

The basic problem with the Government's theory is that it would create, with regard to judicial compensation, two different classes of judges. One class would be all judges who held office from and after 1983.[8] Those judges would be entitled the full benefit of congressionally-granted salary increases, such as they might be, awarded during their term of office. The other class would be all judges who held office prior to 1983 and continued in office for some time thereafter. These latter judges would not receive the Congressionally-granted salary increases which became effective after 1983, because a significant portion of the increases would be allocated to pay the damage award to which they are entitled as a result of the earlier unconstitutional imposition, a damage award owed them by the Government.

That is not an acceptable proposition. There is no basis on which the pre-1983 judges ought to be made to pay, from their own pockets and out of their own salaries, including generally-granted increases, the damages owed to them by the Government, when the judges who were not subject to the unconstitutional imposition are entitled to keep all of their salaries, including the increases the judiciary was awarded.[9]

---

[8] For purposes of the discussion, we use the 1983 date as the significant cut-off. As will be seen in Part 3 of this opinion, for reasons related to the statute of limitations problem, that date may not be the controlling one.

[9] Of course the later-appointed judges are subject to general tax levies in effect at the time of their appointment, *see O'Malley*

The unconstitutional imposition which resulted in dollars being taken from the pre-1983 judges, dollars which were then allocated by the Government to other uses, created a specific liability upon the Government to these judges. It would be inequitable to charge these judges with the duty to pay their own damages from their own salaries, out of salary increases that Congress thereafter granted to all judges, increases unrelated to that liability. It also would be destructive of the principle that "The Judges . . . shall . . . receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const., art. III, § 1.

Congress's purpose in granting the increases received by judges in the years since 1983 is relevant to our inquiry. When the Constitutional Convention turned its attention to Article III and the issue of judicial compensation, the draftsmen first proposed that Congress would be precluded from either decreasing or increasing the compensation of judges. As the Supreme Court explained in *Will*, "Gouverneur Morris succeeded in striking the prohibition on increases; with others, he believed the Congress should be at liberty to raise salaries to meet such contingencies as inflation, a phenomenon known in that day as it is in ours." *Will*, 449 U.S. at 219, 101 S. Ct. 471.

In *The Federalist No. 79*, Alexander Hamilton explained the thinking behind this approach:

> It will readily be understood, that the fluctuations in the value of money, and in the state of

---

v. *Woodrough*, 307 U.S. 277, 59 S. Ct. 838, 83 L.Ed. 1289 (1939), but that is another matter entirely.

> society, rendered a fixed rate of compensation [of judges] in the Constitution inadmissible. What might be extravagant to-day might in half a century become penurious and inadequate. It was therefore necessary to leave it to the discretion of the legislature to vary its provisions in conformity to the variations in circumstances; yet under such restrictions as to put it out of the power of that body to change the condition of the individual for the worse.

The Federalist No. 79, at 491-492 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The wisdom of our founding fathers is borne out by history; since 1969, the base date currently used by the judiciary, inflation has increased by 344% in the aggregate. In the general salary increases Congress has seen fit to grant the judiciary in the years since 1983, there is nothing to suggest that the congressional purpose was to make whole the losses sustained by the pre-1983 judges resulting from the unconstitutional imposition of the tax at issue in this case. On the contrary, everything in the record and the legislative history makes clear that these increases were in response to continued concerns expressed in Congress, within the judiciary itself, in the bar, as well as among segments of the informed public, concerns for the well-being and continued vitality of the federal judiciary if the slide in purchasing power resulting from continued and unadjusted-for inflation was not halted.[10]

---

[10] *See Report of 1989 Commission on Executive, Legislative and Judicial Salaries: Hearings Before the Senate Committee on Governmental Affairs*, 101st Cong., 1st. Sess., 130 (1989).

That slide was as much a concern with regard to the pre-1983 judges who remained in service as it was with regard to those who came to the office later. To deprive the pre-1983 judges of the benefit of those increases by using them to offset the losses they incurred from the Government's earlier wrongful act would not only be unfair, but would be contrary to Congress's purpose in granting the increases. The only proper conclusion that can be reached on the facts before us is that these plaintiffs are entitled to the full measure of compensation for the damages they sustained by the wrong that was visited upon them, and that measure is independent of any generally awarded adjustment to judicial salaries.

3.

The judgment of the trial court must be reversed, and the matter must be returned to that court for determination of damages consistent with this opinion. Because a remand is necessary, there remains a disputed issue that needs resolving regarding the application of the statute of limitations. The judges argue that this case involves what is known as a "continuing wrong," so that each year in which moneys are withheld by the Government, a new cause of action arises. By this theory, no judge whose salary was or is subject to the unconstitutional imposition is barred by the six-year statute of limitations applicable to suits in the Court of Federal Claims. *See* 28 U.S.C. § 2401(a) (1994) ("[E]very civil action commenced against the United States shall be time barred unless the complaint is filed within six years after the right of action first accrues.").

The Government responds that the continuing wrong doctrine is inapplicable to this type of case, and cites

this court's opinion in *Hart* v. *United States*, 910 F.2d 815 (Fed. Cir. 1990). The Government also notes that the application of the continuing wrong theory would mean that no judge would be entitled to more than six years' worth of recovery, since any claim for years prior to that would be barred.

We agree with the Government that this is not the type of case in which the continuing wrong theory makes sense. *See Brown Park Estates—Fairfield Dev. Co.* v. *United States*, 127 F.3d 1449, 1456- 59 (Fed. Cir. 1997). The cause of action arose when the statutes which established the unconstitutional imposition became effective. Some judges "voluntarily" allowed the taxes to be taken from them year after year, in the sense that they did not protest the imposition in the only legally-effective way open to them, by a timely challenge in the courts. A judge who does not challenge the imposition by filing a complaint within the period allowed from the time the cause of action accrued is not protected from the defense of the running of the statute of limitations; like any litigant against the Government, such a plaintiff is subject to having the cause of action barred.

In this case, suit was brought not as a class action but on behalf of the individually named judges. In that regard, there are two causes of action arising under two different statutes. The Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, imposed the Hospital Insurance portion of the Social Security tax on federal judges effective January 1, 1983. Since the pleadings in this case were filed on December 29, 1989, just short of seven years after the cause of action arose, all claims under that Act are subject to being barred by

the running of the statute of limitations. The Old Age and Survivors Disability Insurance portion of the Social Security tax was imposed on federal judges by the Social Security Amendments of 1983, Pub. L. No. 98-21, and was effective January 1, 1984. Since this suit was filed by the original ten judges a few days short of six years from when that cause of action arose, the suit on that claim is not barred.

The rather convoluted accounting the trial judge found himself enmeshed in because of the theory of the case that was adopted in the trial court is wholly irrelevant; therefore we express no opinion thereon.

CONCLUSION

The judgment of the Court of Federal Claims is reversed, and the matter remanded to that court for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 94-5139

JUDGE TERRY J. HATTER, JR., MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR., JUDGE PETER H. BEER, JUDGE DUDLEY H. BOWEN, JR., CHIEF JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA, JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., CHIEF JUDGE TERENCE T. EVANS, JUDGE HENRY A. MENTZ, JR., CHIEF JUDGE WILBUR D. OWENS, JR., JUDGE HENRY R. WILHOIT, JR., JUDGE HAROLD A. BAKER, AND CHIEF JUDGE MICHAEL M. MIHM, PLAINTIFF-APPELLANTS

v.

THE UNITED STATES, DEFENDANT-APPELLEE

ORDER

Each party has filed a combined petition for panel rehearing and petition for rehearing en banc.

Upon consideration thereof,

IT IS ORDERED THAT:

(1) Both petitions for panel rehearing are denied.

(2) The petition for rehearing en banc of the Appellants is granted.

(3) The petition for rehearing en banc of the Appellee is denied.

(4) The judgment of the court entered on August 5, 1999, and reported in 185 F.3d 1356 (Fed. Cir. 1999), is vacated and the opinion of the court accompanying the judgment is withdrawn with respect to part 3.

(5) Additional briefing and argument are not indicated at this time.

FOR THE COURT,

December 20, 1999
Date

/s/ JAN HORBALY
JAN HORBALY
Clerk

APPENDIX K

1. The Compensation Clause of Article III, Section 1, of the United States Constitution provides that "[t]he Judges both of the supreme and inferior courts, * * * shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

2. Section 3101 of Title 26, United States Code, provides, in part:

(a) Old-age, survivors, disability insurance

In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentage of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b))—

* * * * *

(b) Hospital insurance

In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentage of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)) * * *

3. Section 3121 of Title 26, United States Code, provides in part:

(b) Employment

For purpose of this chapter, the term "employment" means any service, of whatever nature, performed * * * ; except that such term shall not include—* * *

(5) service performed in the employ of the United States or any instrumentality of the United States * * * except that this paragraph shall not apply with respect to any such service performed on or after any date on which such individual performs—* * *

(E) service performed as the Chief Justice of the United States, an Associate Justice of the Supreme Court, a judge of a United States court of appeals, a judge of a United States district court (including the district court of a territory), a judge of the United States Court of Federal Claims, a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States magistrate, or a referee in bankruptcy or United States bankruptcy judge[.]

* * * * *

(u) Application of hospital insurance tax to Federal, State, and local employment

(1) Federal employment

For purposes of the taxes imposed by sections 3101(b) and 3111(b), subsection (b) shall be applied without regard to paragraph (5) thereof.

APPENDIX L

The following is a list of other actions that have been filed against the United States in the Court of Federal Claims, challenging thte constitutionality of the extension of the HI or OASDI tax to federal judges' salaries, as well as a list of the plaintiffs to those actions:

Anderson v. *United States*, No. 95-856

Plaintiffs:
G. Ross Anderson, Jr.
Richard A. Enslen
Gerald W. Heaney
Douglas W. Hillman
William C. Lee
Theodore McMillan
James T. Moody
John T. Nixon
Allen Sharp
Thomas R. Brett
William J. Castagne
Stuart Daly, on behalf of T.F. Gilroy Daly
A. Joe Fish
Betty J. Fletcher
J. Owen Forrester
John M. Manos
Consuelo B. Marshall
Neal P. McCurn
Thomas J. Meskill
Stewart A. Newblatt
James C. Paine
Manuel L. Real
Stephen Reinhardt
David L. Russell
Frank Howell Sealy
Joseph E. Stevens, Jr.
Robert W. Sweet

Anna Diggs Taylor
Filemon B. Vela
C. Rogert Vinson
Lee R. West
David K. Winder
Rya W. Zobel
Davis N. Edelstein
Warren W. Eginton
Sherman G. Finesilver
Eugene H. Nickerson
Barbara Jacobs Rothstein
Charles P. Sifton
Leonard D. Wexler
William A. Norris
William O. Bertelsman
Clarence A. Brimmer
W. Earl Britt
Ellen Bree Burns
Peter C. Dorsey
Sam J. Ervin, III
Gerard L. Goettel
J. Dickerson Phillips, Jr.
Thomas C. Platt, Jr.
H. Lee Sarokin
Eugene E. Siler, Jr.
Harold A. Ackerman
Norman W. Black
Harry T. Edwards
Orinda D. Evans
C. Weston Houck
Patricia M. Wald
Thomas G. Hull
Francis G. Murnaghan, Jr.
James A. Redden
John W. Bissell

Carman v. *United States*, No. 95-809T

Plaintiff: Gregory W. Carman

Cerezo v. *United States*, No. 96-300C

Plaintiffs: Carmen C. Cerezo
Juan M. Perez-Gimenez
Hector M. Laffitte

Garcia v. *United States*, No. 96-215

Plaintiffs: H.F. Garcia
James R. Nowlin
Lucius D. Bunton, III

Grady v. *United States*, No. 96-127

Plaintiffs: John F. Grady
James B. Moran
Milton I. Shadur
John A. Nordberg
Marvin E. Aspen
Charles P. Kocoras
Paul E. Plunkett

Henderson v. *United States*, No. 95-856

Plaintiffs: Thelton E. Henderson
Robert P. Aguilar

Kearse v. *United States*, No. 96-426

Plaintiff: Amalya L. Kearse

Newman v. *United States*, No. 97-519C

Plaintiffs: Jon O. Newman
Robert G. Doumar
David D. Dowd, Jr.
Thomas P. Griesa
Hayden W. Head, Jr.
George P. Kazen

Rambo v. *United States*, No. 96-380

Plaintiff: Sylvia H. Rambo

Wicker v. *United States*, No. 96-420

Plaintiff: Thomas C. Wicker, as executor of estate of Veronica D. Wicker

Supreme Court, U.S.
FILED
AUG - 9 2000
CLERK

(3)

No. 99-1978

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JUDGE TERRY J. HATTER, JR., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Of Counsel:

ELLEN E. DEASON
Associate Professor of Law
University of Illinois
503 E. Pennsylvania Ave.
Champaign, IL 61820
(217) 333-1286

W. STEPHEN SMITH*
MORRISON & FOERSTER LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
(202) 887-1500

STEVEN S. ROSENTHAL
DOUGLAS A. TUCKER
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, NW
Washington, DC 20005
(202) 220-9600

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

6200

QUESTIONS PRESENTED

1. Whether a Justice of this Court who earlier disqualified himself or herself from this case may now rescind that disqualification in order to participate in the Court's deliberations.

2. Whether Article III, Section 1 of the Constitution of the United States permits Congress to impose, through a new tax, a discriminatory economic burden on sitting Article III judges.

3. Whether a diminution in the compensation of a limited class of Article III judges in violation of Article III, Section 1 of the Constitution of the United States is remedied by a subsequent increase in the salaries of a wider class of federal employees that was granted for purposes other than to remedy the unconstitutional diminution.

TABLE OF CONTENTS

Page(s)

ADDITIONAL STATUTORY PROVISIONS INVOLVED 1

COUNTER-STATEMENT OF THE CASE..... 1

REASONS FOR DENYING THE WRIT 11

I. WHETHER A QUORUM IS AVAILABLE TO HEAR AND DECIDE THIS CASE 12

II. THE FINAL DETERMINATION OF LIABILITY IN *HATTER IV* SHOULD NOT BE REVIEWED..... 15

III. THE *HATTER VII* DECISION IS CLEARLY CORRECT, IS IN HARMONY WITH THIS COURT'S PRECEDENTS, AND DOES NOT MERIT FURTHER REVIEW..... 24

IV. THE RULINGS BELOW HAVE LIMITED PRECEDENTIAL AND REMEDIAL IMPLICATIONS 28

CONCLUSION 30

APPENDIX A – Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub. L. No. 98-168, 97 Stat. 1105 (1983) 1a

APPENDIX B – Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494, 1059-60 (1984) 14a

APPENDIX C – Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986) 17a

APPENDIX D – 28 U.S.C. § 455..... 21a

APPENDIX E – 28 U.S.C. § 2109..... 25a

TABLE OF AUTHORITIES

Page(s)

CASES

Arizona v. California, 460 U.S. 605 (1983)..... 15

Ashwander v. TVA, 297 U.S. 288 (1936)..... 25

Baker v. Commissioner, 149 F.2d 342 (4th Cir.), *cert. denied*, 326 U.S. 746 (1945) 20

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800 (1988) 15

Doddy v. Oxy USA, Inc., 101 F.3d 448 (5th Cir. 1996) 13

Durant v. Essex Co., 74 U.S. (7 Wall.) 107 (1868) 16

El Fenix de Puerto Rico v. M/Y Johanny, 36 F.3d 136 (1st Cir. 1994) 13

Evans v. Gore, 253 U.S. 245 (1920) ..... *passim*

Gordy v. Dennis, 5 A.2d 69 (Md. 1939) 19

In re Opinions of the Justices, 144 So. 111 (Ala. 1932) 19

Liteky v. U.S., 510 U.S. 540 (1994) 13

Long v. Watts, 110 S.E. 765 (N.C. 1922)..... 19

Messenger v. Anderson, 225 U.S. 436 (1912)..... 15

Miles v. Graham, 268 U.S. 501 (1925)..... 18

Milliken v. Bradley, 418 U.S. 717 (1974) 26

Moody v. Simmons, 858 F.2d 137 (3d Cir. 1988)..... 13

Neil v. Biggers, 409 U.S. 188 (1972) 16

TABLE OF AUTHORITIES – Continued

Page(s)

O'Donoghue v. United States, 289 U.S. 516 (1933) 1

O'Malley v. Woodrough, 307 U.S. 277 (1939) 9, 19, 22, 24, 29

Spector Motor Serv., Inc. v. McLaughlin, 323 U.S. 101 (1944) 25

United States v. Pink, 315 U.S. 203 (1942) 16

United States v. Will, 449 U.S. 200 (1980) ..... *passim*

CONSTITUTION, STATUTES AND RULES

28 U.S.C. § 1 12

28 U.S.C. § 371 ..... 4, 23

28 U.S.C. § 376 4

28 U.S.C. § 455 ..... 1, 12, 13, 14

28 U.S.C. § 2109 ..... 1, 12, 15, 30

42 U.S.C. § 410 ..... 3, 4

Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494, 1059-60 (1984) 1, 7

Act of February 24, 1919, ch. 18, 40 Stat. 1057 26

Act of Feburary 25, 1919, ch. 29, 40 Stat. 1156 26

Exec. Order No. 12,335, 46 Fed. Reg. 61,633 (Dec. 18, 1981) 2

TABLE OF AUTHORITIES – Continued

Page(s)

Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub. L. 98-168, 97 Stat. 1105 (1983) 1, 5, 6, 7, 23

Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986) 1, 7

Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983) 1, 2, 10, 23

Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982) 1

U.S. CONST. art. III, § 1 ..... 1, 17, 18

OTHER

13A Charles Alan Wright, *et al., Federal Practice and Procedure* § 3550 (2d ed. 1984) 13

18 Charles Alan Wright, *et al., Federal Practice and Procedure* § 4478 (2d ed. 1984) 16

15 James Wm. Moore, *Moore's Federal Practice*, ¶¶ 100.05[4][a-b] (Matthew Bender 3d ed. 1999) 21

H.R. Conf. Rep. No. 98-542 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1625 5

H.R. Rep. No. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351 13

Report of the National Commission on Social Security Reform (1983) 3

32 Op. Att'y Gen. 248 (1920) 27

ADDITIONAL STATUTORY PROVISIONS INVOLVED

The additional statutory provisions involved in this case, Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub. L. No. 98-168, 97 Stat. 1105 (1983), Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494, 1059-60 (1984), and Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986), are set forth in the Appendix to this brief. The Appendix also sets forth 28 U.S.C. § 455 and 28 U.S.C. § 2109.

COUNTER-STATEMENT OF THE CASE

The Constitution of the United States provides that the compensation of Article III judges "shall not be diminished during their continuance in office." U.S. CONST. art. III, § 1. This provision "is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary." *United States v. Will*, 449 U.S. 200, 217 (1980). For this reason, "there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation. . . . " *O'Donoghue v. United States*, 289 U.S. 516, 533 (1933).

Recognizing this duty, a group of sixteen Article III judges brought this action against the United States of America. The judges claimed that the United States diminished their compensation in violation of Article III of the Constitution by enactment of the Tax Equity and Fiscal Responsibility Act of 1982 ("Tax Equity Act"), Pub. L. No. 97-248, 96 Stat. 324, the Social Security Amendments of 1983 ("1983 Amendments"), Pub. L. No. 98-21, 97 Stat. 65, and related statutes (collectively, "Social Security Amendments").

This case is now in its eleventh year of litigation. In 1996, this Court entered an order affirming the Federal Circuit's judgment that the enactment of the statutes at issue unconstitutionally diminished the compensation of sitting Article III judges. Since that time, the plaintiff judges, as well as other affected individuals and entities, have relied on the Court's order as a final determination of the liability question. On remand, the only remaining issue was the quantum of damages owed to the judges. While the government continued to claim that the judges were entitled to no (or minimal) damages, the *en banc* Federal Circuit unanimously disagreed. The government now asks this Court to grant certiorari, principally on the ground that the Court should reconsider its 1996 affirmance of the Federal Circuit's judgment on the liability question.

1. In the early 1980s, Congress became concerned about the integrity of the Social Security system. The National Commission on Social Security Reform ("Greenspan Commission") was established by Congress to study this problem and make recommendations about how to strengthen the system. *See* Exec. Order No. 12,335, 46 Fed. Reg. 61,633 (Dec. 18, 1981). At the time, over 90 percent of the 2.7 million federal civilian employees in the United States, including federal judges, did *not* participate in the Social Security system.[1] The Greenspan Commission recommended that "all *newly hired* civilian employees of the Federal Government" should be added to Social Security

[1] *See* Joint Stipulations ("Jt. Stip.") ¶ 19, Joint Appendix before the United States Court of Appeals for the Federal Circuit filed January 11, 1995 ("J.A.") at 96.

to strengthen the program.[2] Congress accepted this recommendation, and the 1983 Amendments provided that federal civilian employees hired *after* December 31, 1983, would be subject to Old Age and Survivors Disability Insurance ("OASDI") withholding.

Under the 1983 Amendments, the vast majority of the federal civilian employees hired before 1984 remained exempt from OASDI withholding. The 1983 Amendments did, however, extend OASDI withholding to a small group of federal civilian employees that were elected, appointed or hired *before* January 1, 1984. Congress imposed immediate coverage on the President and Vice President, certain senior political appointees, members of Congress, certain legislative branch employees not already covered by the Civil Service Retirement System ("CSRS"), and sitting federal judges.[3] With the exception of federal judges, the group added under the 1983 Amendments consisted of political appointees or elected officials of the legislative and executive branches. In sum, less than one-half of one percent of the federal civilian workforce (or less than 12,500 employees) were mandatorily added to OASDI coverage as a result of the 1983 Amendments. Lynn Decl. ¶ 42(b), J.A. at 120-21.[4]

2. At the time each judge in this case was appointed to the bench, their judicial salaries were *not* subject to withholding for Social Security coverage. *See* 42 U.S.C.

[2] Report of the National Commission on Social Security Reform at 2-7 (1983) ("Commission Report") (emphasis added).

[3] 42 U.S.C. § 410(a)(5)(C)-(G); *see generally* Jt. Stip. ¶ 29 & attached material, J.A. at 98, 104-06.

[4] The history of the Social Security Amendments, and a careful analysis of the operation and effect of these statutes, is contained in the declaration of respondents' expert Peter R. Lynn, which was submitted by the judges in support of their motion for summary judgment. J.A. at 107-30.

§ 410(a)(6)(A) (1980). Rather, Article III judges were (and remain) subject to special statutory retirement provisions that reflect their lifetime tenure. After meeting certain age and service requirements, an Article III judge may retire from active service (*i.e.*, assume senior status), but render service as he is able. In this event, the judge retains the salary of the office, including increases. 28 U.S.C. § 371(b). Alternatively, an Article III judge may retire from office and receive an annuity for the remainder of his lifetime equal to the judicial salary at the time of his retirement. 28 U.S.C. § 371(a). In addition, Article III judges have the option of contributing to the Judicial Survivors' Annuity Fund to provide for their survivors. 28 U.S.C. § 376.

Each judge in this case was appointed to his or her office by the President before January 1, 1983, the date on which Article III judges first became subject to the HI portion of Social Security withholding imposed by the Tax Equity Act. On January 1, 1984, judges first became subject to the OASDI portion of Social Security withholding imposed by the 1983 Amendments. *See* 42 U.S.C. § 410(a)(5), (p). Thus, in making the decision to accept a federal judicial appointment, each of the judges understood he would receive the statutory judicial income, calculated without deductions for Social Security. *See* Declarations of Judges, J.A. at 26-90. In addition, several took special note of, and relied specifically on, the savings that would result from the provision of statutory retirement benefits without Social Security deductions.[5]

---

[5] *See, e.g.*, A.J. McNamara Decl. ¶ 3, J A. at 45-46 (considered absence of Social Security deduction from judicial salary in calculating his ability to pay for college education of four children); Henry A. Mentz, Jr. Decl. ¶ 3, J.A. at 72-73 (absence of Social Security deduction from judicial salary was a factor making judicial appointment attractive); Michael M. Mihm Decl. ¶ 3, J.A. at 79-80 (considered absence of Social Security deduction important in light of career in public service and family obligations).

3. Congress recognized that the effect of the 1983 Amendments would be to subject federal civilian employees hired after January 1, 1984, to mandatory withholding for two different retirement programs (*i.e.*, Social Security and CSRS). In order to give these employees relief from dual withholding until a new federal retirement system could be created, Congress enacted the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 ("Adjustment Act"), Pub. L. No. 98-168, 97 Stat. 1106 (1983). Under the Adjustment Act, the total amount deducted from a new employee's salary was no greater than the amount withheld from an existing CSRS employee earning the same salary, even though the new employee was subject to both CSRS and Social Security. These new employees would eventually become subject to a new government retirement system that had yet to be developed, and would receive credit under that system for their interim service under CSRS. Adjustment Act § 207, 97 Stat. at 1111, 5 U.S.C. § 8331 note, at 995-96.

The Adjustment Act also included special provisions for the group of existing elected officials and appointees mandatorily added to Social Security on January 1, 1984. Congress recognized that "the rules [were] being changed in the middle of the game" for this group and provided them with choices to harmonize their deductions for retirement programs. H.R. Conf. Rep. No. 98-542, at 13 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1625, 1628. The Conference Report on the Adjustment Act states:

> Unlike newly hired employees who may elect whether or not to accept Government employment and face the uncertainties of a yet-to-be-established supplemental retirement program, *the affected group has no election other than to resign* (which in many instances would involve resignations from elected offices, *lifetime judicial appointments*, or presidentially appointed and Senate-confirmed positions).

Id. (emphases added).

In order to "mitigate th[is] unfairness," *id.*, the Adjustment Act allowed most of those mandatorily added on January 1, 1984, to choose from three options: (1) to discontinue participation in the covered retirement system (usually CSRS) and receive a refund of previous contributions (resulting in Social Security coverage only); (2) to participate fully in both the covered retirement system and Social Security; or (3) to participate in both systems subject to the Adjustment Act interim "offsets" applicable to new employees, which would leave their total deductions unchanged. Adjustment Act § 208, 97 Stat. at 1111-12, 5 U.S.C. § 8331 note, at 997.

While the provisions of the Adjustment Act would appear to encompass Article III judges, in actuality they do not. Neither the retirement provisions of the Judicial Code nor the Judicial Survivors' Annuity Fund were defined as "covered retirement systems" within the meaning of the Adjustment Act (even though these provisions had been treated as such previously). Consequently, Article III judges were not entitled to reduce, much less eliminate, the effect of Social Security withholding on their salaries. Political appointees and members of Congress, in contrast, received two separate opportunities to do so – one under the Adjustment Act and a second under the Deficit Reduction Act, enacted several months after the 1983 Amendments took effect. The Deficit

Reduction Act allowed the same elections as the Adjustment Act retroactive to January 1, 1984. Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494, 1059-60 (1984). *See* Lynn Decl. ¶¶ 21-31, J.A. at 113-16. In 1986, Congress established a new Federal Employees Retirement System – "FERS" – which combined Social Security with a basic benefit and an optional savings plan. Federal Employees Retirement System Act of 1986 ("FERS Act"), Pub. L. No. 99-335, 100 Stat. 514.[6]

Under the FERS Act, the same group of existing employees added mandatorily to Social Security on January 1, 1984, that had been given the opportunity to make elections under the Adjustment Act and the Deficit Reduction Act was once again given a choice of several retirement options. FERS Act § 301(b), 100 Stat. 514, 599-600, 5 U.S.C. § 8331 note. These choices once again permitted the eligible employees to offset the economic effect of the added Social Security withholding. As before, however, Article III judges were not eligible to make any elections to reduce the amount withheld from their salaries as a result of the imposition of Social Security deductions. Lynn Decl. ¶¶ 32-40, J.A. 117-19.

4. On December 29, 1989, the judges initiated this action by filing a complaint in what was then the United States Claims Court. The complaint alleged, *inter alia*, that the Social Security Amendments unconstitutionally diminished their compensation and unconstitutionally discriminated against federal judges. On November 9,

---

[6] While participants in CSRS were given the option to join FERS, FERS Act § 301(a), 100 Stat. 599, 5 U.S.C. § 8331 note, at 990-91, only four percent chose to do so. Jt. Stip. ¶ 26, J.A. at 97. As a result, even with the turnover in federal employees that had occurred since 1984, the majority of civilian federal employees were not subject to Social Security as of September 1991. Jt. Stip. at ¶ 23, J.A. at 97.

1990, the Claims Court (Turner, J.) dismissed the judges' complaint for lack of subject matter jurisdiction ("*Hatter I*"). Pet. App. 17a-18a. On appeal, the Federal Circuit reversed and remanded the case for a hearing on the merits of the judges' damages action ("*Hatter II*"). *Id.* at 28a-29a.

5. On remand, the parties conducted discovery and filed cross-motions for summary judgment. On June 22, 1994, the Court of Federal Claims granted the defendant's motion for summary judgment ("*Hatter III*"). *Id.* at 53a. The court held that while "direct" diminutions (*i.e.*, reductions in statutory salaries) are always unconstitutional, regardless of purpose or effect, an "indirect" diminution (*i.e.*, the imposition of a new tax) is unconstitutional only if a judge can demonstrate that it is the product of "legislative intent to influence the judiciary," a showing that the judges in this case did not make. *Id.* at 38a. In addition, while the court acknowledged that the elections afforded other federal employees meant that, unlike the judges, they suffered "no change in take home pay," it found this discriminatory treatment constitutional because there was no showing that Congress' action was motivated by an intent to influence the judiciary. *Id.* at 49a-50a.

6. On August 30, 1995, the Federal Circuit reversed, holding that the Social Security Amendments unconstitutionally diminish the compensation of Article III judges who took office prior to the enactment of the Amendments ("*Hatter IV*"). *Id.* at 66a. The court found that, in order to ensure judicial independence and attract good and competent individuals to the bench, "the Framers adopted an unrestricted protection for judicial compensation." *Id.* at 56a-58a. The court held that *Evans v. Gore*, 253 U.S. 245 (1920), controlled the case, and that where federal law did not charge plaintiffs with the duty of paying

the tax in question when they first assumed office (as in *Evans*), the subsequent imposition of the tax impermissibly reduced their salaries. Pet. App. at 59a. *O'Malley v. Woodrough*, 307 U.S. 277 (1939), did not affect the analysis, since the claimant judge in that case had taken office after Congress had made the taxes in question applicable to judges' salaries; thus, the "judicial claimants had suffered no diminishment in compensation after taking office." Pet. App. at 60a. The court did not reach the judges' independent contentions that the statutes at issue discriminated against judges. The court remanded the case for calculation of the amounts owed the judges in damages.

7. The government petitioned for certiorari, asking this Court to determine whether the imposition of Social Security taxes on sitting Article III judges violated the Compensation Clause. The government raised the question whether "some members of this Court are disqualified from hearing" the case, but argued, *inter alia*, that "the substantial increase in judicial salaries" that had been granted to all judges since the imposition of the taxes "would appear to have offset any purported 'diminution' in compensation" caused by the Social Security Amendments. Petition for a Writ of Certiorari at 25 n.12, *United States v. Hatter*, No. 95-1733 ("Prior Pet.").

On October 7, 1996, finding that it lacked a quorum and that a majority of the qualified Justices "are of the opinion that the case cannot be heard and determined at the next Term of the Court," the Court issued an order stating that the court of appeals' "judgment is affirmed under 28 U.S.C. § 2109 . . . with the same effect as upon affirmance by an equally divided Court" ("*Hatter V*"). Pet. App. at 69a.

8. On remand, the judges submitted undisputed evidence of the amounts unlawfully withheld from their salaries, which ranged from approximately $20,000 to $56,000. The amounts varied because each judge sought damages for the six-year statute of limitations period that preceded his or her joining the original complaint. Notwithstanding its repeated acknowledgements that the continuing nature of the judges' claims would entitle them to this relief, *see* Prior Pet. at 25 n.12, the government argued for the first time in its reply brief that any judge whose claim was filed more than six years after the *enactment* of the Social Security Amendments was barred from any recovery by the statute of limitations.

The trial court agreed, and then found that the remaining judges' claims for diminished compensation were limited to one month (December 1983) because the diminution suffered by those judges in the months and years that followed were "cured" by salary increases that were granted to all Article III judges (and other federal employees) beginning January 1, 1984 ("*Hatter VI*"). *Id.* at 82a. Thus, the trial court held that eight of the sixteen judges were entitled to no recovery, while the other eight were entitled to either $328.95, plus interest (for district court judges) or $347.85, plus interest (for court of appeals judges). *Id.* at 110a-111a.

A panel of the Federal Circuit reversed the trial court's conclusion that the general salary increases granted to all Article III judges (and other federal employees) "cured" the diminution in compensation suffered by those judges who accepted their appointments prior to the enactment of the Social Security Amendments in 1983 ("*Hatter VII*"). *Id.* at 125a. The panel found that "everything in the record and legislative history makes

clear that these [salary] increases" were provided to offset the effects of inflation. *Id.* at 124a. Because the affected judges would have received the general increases regardless of whether their salaries had been diminished, "using [those increases] to offset the losses they incurred from the government's earlier wrongful act" would "deprive the pre-1983 judges of the benefit of those increases," and defeat "Congress'[ ] purposes in granting the increases." *Id.* at 125a. The panel, however, agreed with the trial court that the judges' claims were not "continuing" claims and therefore, held that many of those claims were time-barred. *Id.* at 126a.

Both the judges and the government petitioned for rehearing and rehearing *en banc*. The court denied the government's petition, but granted the judges' petition to rehear *en banc* the panel's decision with respect to the statute of limitations issue. In an opinion by Judge Plager, the author of the panel opinion, the *en banc* court unanimously reversed the panel's decision on the statute of limitations question (and reinstated the panel's opinion with respect to the other issues). *Id.* at 2a. The full court held that, under long-established precedent, the judges' claims "fall[ ] comfortably on the side of the line governed by the continuing claim doctrine." *Id.* at 11a.

REASONS FOR DENYING THE WRIT

As a threshold matter, the Court must consider whether a quorum exists to hear this case. When last before this Court, four Justices recused themselves from this case. The government urges at least some of these Justices to rescind these recusals but offers no authority for the proposition that once recused, a Justice may again consider his or her recusal, particularly to consider whether a lower court judgment that had been affirmed should now be reversed. Moreover, the authority the

government offers to invoke the Rule of Necessity as an alternative source of a quorum is inapposite.

Should the Court conclude that a quorum is available, it should deny further review for three reasons. First, in respect to questions addressed in *Hatter IV*, this Court's order affirming the *Hatter IV* judgment should foreclose further dispute between the parties. Moreover, *Hatter IV* correctly held that the diminution in judicial compensation at issue here falls within the proscriptions of the Compensation Clause. Second, in respect to *Hatter VII*, the unanimous, *en banc* court of appeals' opinion merely and correctly applied longstanding principles of remedies to arrive at damages for the diminution found in *Hatter IV*. Finally, both decisions have limited precedential implications. The only effect of denying the petition will be to permit a limited class of Article III judges to recover damages for an unusual, yet plainly unconstitutional, diminution in their judicial compensation.

I. WHETHER A QUORUM IS AVAILABLE TO HEAR AND DECIDE THIS CASE

1. The petition correctly notes that "[t]here is a threshold question whether a quorum of the Court is available to hear and decide this case." Pet. at 16. When the government petitioned for review of precisely the same question in 1996, it observed that a Justice who may benefit from the outcome of this case "arguably would have 'a financial interest in the subject matter in controversy,' that would require disqualification under 28 U.S.C. § 455(b)(4)." Prior Pet. at 25 n.12. Four Justices recused themselves, and this Court therefore lacked the necessary quorum of six Justices under 28 U.S.C. § 1. Pet. App. 69a. In view of the lack of a quorum, the Court entered an order under 28 U.S.C. § 2109 affirming the decision of the Federal Circuit in *Hatter IV*. *Id.*

Now, the government argues that by reason of the passage of time, the "circumstances that previously indicated recusal may no longer be present" and that, therefore, one or more Justices who recused themselves may nevertheless hear this case. Pet. at 19. The government assumes that a judge or Justice who has been recused from a case can thereafter have substantive involvement. The government, however, provides no legal authority for its assumption. Nor are we aware of any such authority.

We know of no prior occasion on which a federal judge or Justice, once having recused himself or herself, thereafter rescinded the prior recusal and decided to hear a case. Implying a contrary rule, several courts of appeals have held that, upon complete recusal in a case, a judge may exercise no further authority in it other than to issue ministerial orders. *E.g.*, *Doddy v. Oxy USA, Inc.*, 101 F.3d 448, 457-58 (5th Cir. 1996); *El Fenix de Puerto Rico v. M/Y Johanny*, 36 F.3d 136, 141-42 (1st Cir. 1994); *Moody v. Simmons*, 858 F.2d 137, 143 (3d Cir. 1988); *see also* 13A Charles Alan Wright, *et al.*, *Federal Practice and Procedure*, § 3550, at 629 (2d ed. 1984).

Nothing in the recusal statute, 28 U.S.C. § 455, suggests that a judge or Justice may revisit and rescind a prior recusal determination. Section 455 was extensively amended in 1974 based upon considerable input from the bench and organized bar. *See* H.R. Rep. No. 93-1453 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6351, 6352-53. The 1974 amendments specify in far greater detail than had previously been the case the specific grounds which require a judge or Justice to recuse himself. *Compare* 28 U.S.C. § 455(b) *with* 28 U.S.C. § 455 (1970); *see also Liteky v. United States*, 510 U.S. 540, 546-48 (1994) (discussing section 455's legislative history). Despite this added detail, the statute contains no mention of circumstances that

would permit a judge or Justice to rescind his or her recusal.[7]

2. The government argues in the alternative, as it did in its prior petition, that the Rule of Necessity permits the entire Court to hear and decide the case. Although the petition cites *United States v. Will*, 449 U.S. 200 (1980), Pet. at 17, that case makes clear that the Rule of Necessity applies only if "*all* Article III judges have an interest in the outcome." 449 U.S. at 212 (emphasis added). When all judges are interested, interested judges must hear the case lest "litigants . . . be denied their right to a forum." *Id.* at 217.

However, disinterested judges were available to hear all questions in this case at both the trial and appellate levels. The litigants' interests in the availability of a forum have been fully satisfied by the adjudications already rendered. As was the case when the government raised this argument in its prior petition, the Rule of Necessity is simply inapposite.[8]

---

[7] Section 455(f) does provide that a judge or Justice may continue to hear a case notwithstanding discovery of a financial interest that would otherwise disqualify the judge or Justice if the judge or Justice divests the interest. 28 U.S.C. § 455(f). However, Congress carefully limited this exception to a circumstance in which the judge or Justice learns of the financial interest "after substantial judicial time has been devoted to the matter." *Id.* A decision by a Justice to rescind his or her earlier recusal in this case may be deemed authority for lower court judges to rescind their recusals beyond the limited circumstance permitted by section 455(f), even though substantial judicial time has *not* been devoted to the matter.

[8] The government finds it "noteworthy" that the entire Court heard and decided its pre-1940 Compensation Clause cases. Pet. at 17. Prior to 1948, however, the judicial disqualification statute in effect, then codified at 28 U.S.C. § 24, applied only to district court judges, not circuit court judges or Justices of this Court.

The government, in short, offers no justification why a Justice of this Court should take the extraordinary step of rescinding his or her recusal from this matter. That the existence of a quorum turns on this issue is of no moment. Congress expressly provided for the possibility that disqualifications might deprive the Court of a quorum in a particular case. As with the government's prior petition, in the absence of a quorum, 28 U.S.C. § 2109 provides that "the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court."

II. THE FINAL DETERMINATION OF LIABILITY IN *HATTER IV* SHOULD NOT BE REVIEWED

1. The "law of the case" doctrine strongly counsels against a plenary review of the liability issues addressed in *Hatter IV* and affirmed by this Court in *Hatter V*. Law of the case "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983). To be sure, the "[l]aw of the case doctrine . . . 'directs a court's discretion, it does not limit the tribunal's power.' " Pet. at 20 (quoting *Arizona*, 460 U.S. at 618); *see Messenger v. Anderson*, 225 U.S. 436, 444 (1912). But this Court has emphasized that "as a rule courts should be loathe to [revisit prior decisions] in the absence of extraordinary circumstances such as where the initial decision was 'clearly erroneous and would work a manifest injustice.' " *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 817 (1988) (quoting *Arizona*, 460 U.S. at 618 n.8).

The government contends that the policies supporting the law of the case doctrine do not apply here because this Court did not "examine the merits" of the liability

issue. Pet. at 20. This Court's precedents, however, treat an affirmance by an equally divided court as having precisely the same legal effect – as between the parties to the case – as an affirmance following plenary review. In *Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107 (1868), the Court refused to revisit an earlier affirmance by an equally divided Court. *Durant* arose when the party who had lost in the first case initiated a second action raising the same issues. The Court explained that the word "affirmance" is simply "the most convenient mode of expressing the fact that the cause is *finally disposed of.*" *Id.* at 112 (emphasis added). The absence of an opinion prevents the decision from becoming precedent, "[b]ut the judgment is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." *Id.* at 113. *See also United States v. Pink*, 315 U.S. 203, 216 (1942), (an affirmance by an equally divided Court is "conclusive and binding upon the parties *as respects that controversy.*") (emphasis added).[9] To permit re-litigation of issues that have been finally decided as between the parties would, as this case illustrates, subject both courts and parties to the "burdens of repeated reargument by indefatigable diehards." 18 Charles Alan Wright, *et al., Federal Practice and Procedure* § 4478, at 790 (1984).

Moreover, in this case, it is the Court's reconsideration of the liability issues that would result in a manifest injustice. The Administrative Office of the U.S. Courts since 1996 has provided all of the affected judges the option to end Social Security deductions. We understand

---

[9] While the Court did revisit in a later habeas corpus proceeding an affirmance by an equally divided Court rendered upon a direct appeal of a criminal conviction, *Neil v. Biggers*, 409 U.S. 188 (1972), it did so because of "the peculiarities of federal court jurisdiction" in the habeas corpus context. *Id.* at 190.

that over the past four years a significant number of judges have directed the Administrative Office to stop HI and OASDI deductions. Thus, both the agency administering the court system and individual judges have taken action in reasonable reliance on *Hatter V*; it would be unjust to revisit that determination at this late date.

2. There is no dispute that the Social Security Amendments, in fact, diminished the compensation of the pre-enactment Article III judges. The question addressed by the court of appeals in *Hatter IV*, is whether this diminution falls outside the proscriptions of the Compensation Clause. As the history and purpose of the Compensation Clause and long-standing precedent make clear, the answer to this question is no.

a. The purpose of Article III, Section 1 of the Constitution is to ensure that the judicial branch is both competent and independent. *Will*, 449 U.S. 200 at 217-18. By prohibiting the executive and legislative branches from exercising "control over the tenure and compensation of judges," Article III, Section 1 guarantees that the judiciary is "truly independent" and "free of improper influence from other forces within government." *Will*, 449 U.S. at 218. The guarantees of Article III also serve to increase the stature and competence of the federal judiciary by ensuring a prospective judge that "in abandoning private practice – more often than not more lucrative than the bench – the compensation of the new post will not diminish. Beyond doubt, such assurance has served to attract able lawyers to the bench and thereby enhance[d] the quality of justice." *Will*, 449 U.S. at 221 (citing *Evans*, 253 U.S. at 253; 1 J. Kent, *Commentaries on American Law* 276 (1826)).

b. In *Hatter IV*, the court of appeals correctly concluded that the statutes at issue diminish compensation in a manner that is inconsistent with both the language

and the purpose of Article III, Section 1. Because the Framers "considered judicial independence a core value of the Constitution," they "adopted a broad protection for it." Pet. App. 63a. The Compensation Clause, as this Court observed in *Evans*, "contains no excepting words and appears to be directed against all diminution, whether for one purpose or another." 253 U.S. at 255. The language of the Clause thus plainly encompasses diminutions that result from the imposition of taxes on the compensation of *sitting* Article III judges. This is the central holding of *Evans*. As the court of appeals explained, the holding in *Evans* follows ineluctably from the purposes of the Clause. Pet. App. 59a. The imposition of a new tax on the compensation of sitting Article III judges threatens both the independence and competence of the judicial branch in exactly the same manner as a diminution in the statutory salary. Both diminutions "withhold or take from the judge a part of that which has been promised by law for his services." *Evans*, 253 U.S. at 254.[10]

Evans' focus on the compensation of *sitting* judges was blurred in *Miles v. Graham*, 268 U.S. 501, 509 (1925), when the Court held that the Compensation Clause prohibited the imposition of a general federal income tax law on judges who assumed office *after* the tax became law. In reaching this conclusion, the Court relied on *Evans*, which

---

[10] The same cannot be said with respect to judges who are appointed after the tax at issue is enacted. First, when a tax has been imposed on judicial compensation before a judge takes office, there is, by definition, no diminution in compensation during the judge's "continuance in office." U.S. CONST. art. III, § 1. Second, in these circumstances, there is no threat to judicial independence or competence; as the court of appeals explained, the tax is simply "a pre-existing obligation factored into the new judges' compensation." Pet. App. 60a.

contained reasoning that was far broader than necessary to support its central holding. *See* Pet. at 22. Indeed, as this Court observed in *Will*, the broad rationale of *Evans* suggests that the Compensation Clause "erect[s] an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges." 449 U.S. at 227.

The Court criticized the broad rationale of *Evans*, and expressly overruled the holding of *Miles*, in *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939). Like *Miles*, *O'Malley* involved a challenge to a federal income tax statute by a judge who was appointed to the court of appeals after the tax in question was enacted. The Court held that it would "trivialize the great historic experience on which the framers based the safeguards of Article III, § 1" to hold that "a non-discriminatory tax laid generally on net income" threatens "the independence of judges *who took office after Congress*" enacted the tax. *Id.* at 281-82 (emphasis added).

O'Malley criticized the broad reasoning of *Evans*,[11] but it did not overrule the holding of that case. *Id.* Nor did *Will*. 449 U.S. at 227. The lower courts, including the court of appeals here, have had no difficulty understanding that "in overruling *Miles v. Graham* and leaving *Evans*

---

[11] The commentators at the time focused their criticism on the *Evans* Court's use of the intergovernmental tax immunity doctrine, which, as the government notes, has since been disapproved. Pet. at 24-25. They did not, by and large, criticize the holding of *Evans*. Moreover, contrary to the statement in *O'Malley* that *Evans* "was rejected by most of the courts before whom the matter came after that decision," 307 U.S. at 281, the fact is that many states have adopted the *Evans* rule as a matter of state constitutional law. *See Gordy v. Dennis*, 5 A.2d 69, 82 (Md. 1939); *In re Opinions of the Justices*, 144 So. 111 (Ala. 1932); *Long v. Watts*, 110 S.E. 765 (N.C. 1922).

v. Gore standing, [the Court] obviously meant to let the decision in the latter case rest upon its own facts." *Baker v. Commissioner*, 149 F.2d 342, 343 (4th Cir.), *cert. denied*, 326 U.S. 746 (1945).

3. This case illustrates why the central holding of *Evans* should not, as the government urges, be reversed. When the judges in this case were appointed to the bench, each compared his compensation in private life, which already reflected Social Security withholding, to his prospective compensation as a judge, which included no diminution for Social Security withholding. Declarations of Judges, J.A. at 26-90. Based on a comparison of these two amounts, each judge accepted his appointment. *Id.* The Social Security Amendments significantly and adversely altered this economic calculus: they not only diminished the judges' compensation, but they did so in a way that made the judicial office *relatively* less attractive. In other words, the statutes affected only one side of the economic scale on which the judge weighed his decision to accept appointment to the bench. Congress expressly recognized this fact, observing that individuals holding "lifetime judicial appointments" when these amendments were passed had no way to avoid the diminution in compensation "other than to resign." *See supra* p.7.

The effect of the Social Security Amendments, in short, is no different in constitutional terms than a reduction in the statutory salaries of Article III judges or, indeed, the imposition of a tax solely on the salaries of Article III judges. Each diminishes the compensation that was promised to sitting judges when they decided to accept their appointments to the bench, and thereby encourages them to return to private life. As the court of appeals recognized, this is precisely the sort of economic threat to judicial independence and competence that the Compensation Clause was designed to prevent.

The government contends that a diminution in compensation that results from the imposition of a tax on sitting Article III judges can never pose "a threat to the constitutional value of judicial independence," at least in the absence of a showing that "Congress intended to undermine the independence of federal judges." Pet. 25-26 n.25. The mechanism the Framers chose to protect judicial independence and competence does not, however, distinguish among diminutions based on Congress' intent; it is a broad prohibition on any diminution in judicial compensation. Thus, in *Will*, this Court struck down Congress' rescission of certain cost-of-living increases for judges even though there was no argument that the rescissions in question were "intended to undermine the independence of federal judges." Pet. at 26 n.25. *See also* 15 James Wm. Moore, *Moore's Federal Practice* ¶ 100.05[4][a-b] (Matthew Bender 3d ed. 1999) (rejecting the contention that the Compensation Clause reaches only those diminutions that "actually threaten judicial independence," explaining that "the difficulty and awkwardness of engaging in this equitable inquiry lies behind the practice of separation of powers in general. In any event, the text of Article III does not permit such a course.")

The irony of the government's position is that if Congress truly wished to attack the independence of Article III judges by diminishing their compensation, what better way to accomplish this end than by extending to them a tax from which they were previously exempt. After all, a reduction in statutory salaries would not survive judicial challenge in light of *Will*; nor, in all likelihood, would a tax levied solely on the salaries of Article III judges. The extension of a tax from which judges had been previously exempt (in this case, exempt for approximately 50 years), however, would achieve two

ends: it would make the judicial office relatively less attractive to those already holding it, while simultaneously preserving the appearance of legislative even-handedness.

4. *Hatter IV* is independently sustainable on the ground that the statutes at issue in this case diminished judicial compensation in a discriminatory manner. Although a showing of discrimination is not necessary to prove a violation of the Compensation Clause, *see Will*, 449 U.S. at 226 (the Clause "makes no exceptions for 'non-discriminatory' reductions"), there is no dispute that the Compensation Clause prohibits a statute that imposes a different and greater economic burden on Article III judges. *See O'Malley*, 307 U.S. at 282. Although the Federal Circuit did not reach the issue, the stipulated facts of record demonstrate that the Social Security Amendments and subsequent legislation diminished the compensation of sitting Article III judges in a discriminatory manner.

a. The Social Security Amendments discriminated against Article III judges in that they imposed on those judges a new tax burden that was not borne by millions of working Americans. According to stipulated Social Security Administration data, 17.1 percent of the labor force (excluding the Armed Forces) was *not* subject to Social Security deductions as of December 1983, a figure which declined to 14.1 percent (*i.e.*, approximately 8 million employees) a year after adoption of the 1983 Amendments. Jt. Stip. ¶¶ 18, 27, Table 4, J.A. at 95-96, 98, 100. Thus, unlike the income tax statutes at issue in *Evans* and *O'Malley*, Social Security taxes are not a duty that judges "share[ ] with all other[ ] [citizens]." *Evans*, 253 U.S. at 265 (Holmes, J., dissenting).

b. The statutes at issue also discriminated against sitting Article III judges in comparison to other federal employees. From the establishment of the Social Security

system until the adoption of the 1983 Amendments, relatively few employees of the United States Government were covered by OASDI because old age, survivors, and disability benefits were already provided to these employees under existing publicly-financed systems established by Congress. Likewise, as the government acknowledges, Article III judges were excluded because "judges were (and are) entitled to retire . . . and to receive lifetime annuities equal to their salary at the time of retirement" as provided in 28 U.S.C. § 371. Pet. at 3. According to Office of Personnel Management (OPM) estimates, 2,503,914 civilian federal employees (or 92.4 percent of all such employees) were not subject to Social Security as of September 1983. Jt. Stip. ¶ 19, J.A. at 96.

The 1983 Amendments did not require OASDI coverage for the overwhelming majority of federal employees who, like the plaintiffs, were hired before 1984. Although pre-1984 federal employees were eligible to transfer to the new FERS system, which would subject them to Social Security coverage and withholding, an overwhelming 96 percent of eligible pre-1984 federal employees opted to retain their old non-Social Security retirement system. *Id.* ¶ 26, J.A. at 97. To deny this option to Article III judges was discrimination.

c. In a series of statutes – the Adjustment Act, the Deficit Reduction Act and the FERS Act – Congress repeatedly discriminated against federal judges, denying them financial benefits and elections that it granted to other federal employees, including those mandatorily included in Social Security under the 1983 Amendments. As a result, federal judges *alone* had no choice but to bear the full economic effect of having OASDI taxes withheld

from their compensation. *See* Lynn Decl. ¶¶ 16, 27-40, J.A. at 111-12, 115-19.[12]

The taxes imposed on sitting federal judges by the statutes at issue in this case are not, in short, taxes "of general, non-discriminatory application to all earners of income." *O'Malley*, 307 U.S. at 280. Millions of working Americans were exempt from these taxes in 1983 and remain exempt today. Moreover, in extending these taxes to Article III judges, Congress did so in a manner that imposed a far greater economic burden on the judges than on any other federal employees. This discrimination renders the statutes at issue here unconstitutional under the Compensation Clause.

III. THE *HATTER VII* DECISION IS CLEARLY CORRECT, IS IN HARMONY WITH THIS COURT'S PRECEDENTS, AND DOES NOT MERIT FURTHER REVIEW

The government challenges the Federal Circuit's holding that the unconstitutional diminutions of compensation caused by the imposition of HI and OASDI taxes on sitting Article III judges were not remedied by subsequent salary increases. Pet. at 26-29. This challenge, however, ignores the Federal Circuit's central finding and, in

[12] The government has sought to justify the discriminatory treatment of federal judges under these statutes on the ground that federal judges, unlike other federal employees, were not required to "pay" for a statutory retirement system. While Article III judges do not "pay" in the form of payroll withholding for the salary or annuity to which they become entitled upon retirement from active service, they do pay for that retirement entitlement by accepting a relatively low annual salary while in active service.

so doing, elevates a simple matter of statutory interpretation into a more difficult (and unnecessary) issue of constitutional interpretation.

1. It is undisputed that all of the salary increases that Article III judges have received from Congress during the period relevant to this case were given to broad segments of the federal workforce to remedy the effects of inflation on federal salaries. The Federal Circuit was, therefore, clearly correct when it concluded that:

> In the general salary increases Congress has seen fit to grant the judiciary in the years since 1983, there is nothing to suggest that the congressional purpose was to make whole the losses sustained by the pre-1983 judges resulting from the unconstitutional imposition of the tax at issue in this case. On the contrary, everything in the record and the legislative history makes clear that these increases were in response to continued concerns expressed in Congress, within the judiciary itself, in the bar, as well as among segments of the informed public, concerns for the wellbeing and continued vitality of the federal judiciary if the slide in purchasing power resulting from continued and unadjusted-for inflation was not halted.

Pet. App. 124a (footnote omitted).

Since the relevant salary increases had no stated purpose other than to compensate judges (and many other federal employees) for the effects of inflation on their purchasing power, the difficult constitutional questions being raised by the government as to whether and to what extent subsequent salary increases can remedy past unconstitutional diminutions are not presented in this case and should not be decided. *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944); *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring). ("If a

case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.")

2. The government contends that any salary increase paid to judges, regardless of its stated purpose or clear effect, will cure an unconstitutional diminution so long as it exceeds the amount of the initial diminution. This is plainly wrong. Consider the following example: Assume that shortly before a general increase of $25,000 in the salaries of all circuit judges, Congress lowers the salaries of D.C. Circuit judges by $24,000 because of congressional displeasure with recent decisions of that Court. According to the government, D.C. Circuit judges would have no claim because the increase would have more than offset the unconstitutional diminution, despite the fact that the D.C. Circuit judges would still be $24,000 worse off than they would have been but for the unconstitutional diminution. Put simply, general salary increases cannot remedy an unconstitutional diminution in the compensation of a group of judges – as both the hypothetical example and the facts of this case show – because in neither circumstance are the plaintiff judges in the same position they would have been in but for the unconstitutional diminution. *Milliken v. Bradley*, 418 U.S. 717, 746 (1974).

3. The Federal Circuit's decision in *Hatter VII* is fully consistent with this Court's Compensation Clause precedents. First, on the day after the enactment of the income tax statute challenged in *Evans*, Congress increased judicial compensation of district court judges and circuit court judges by amounts far in excess of the amounts the judges owed under the income tax statute. *See* Act of February 24, 1919, ch. 18, 40 Stat. 1057 (tax statute); Act of February 25, 1919, ch. 29, 40 Stat. 1156 (increasing compensation of district judges from $6,000 to

$7,500 and of circuit judges from $7,500 to $8,500). Under the government's reasoning, judges appointed prior to the enactment of the income tax statute should have begun to pay income taxes on their salaries as soon as these increases went into effect on March 1, 1919. Yet, they did not.[13]

Secondly, in *United States v. Will*, 449 U.S. 200 (1980), the Supreme Court considered the constitutionality of Congress' repeal of judicial salary increases in four separate years. With respect to "Year 1," the plaintiff judges sought (and were awarded) relief only for the period October 1, 1976 (the day the diminution in salary occurred), to March 1, 1977 (the day the plaintiffs received an increase pursuant to the quadrennial review that raised their salaries above the pre-diminution levels). The reason why the plaintiffs in *Will* sought no relief after March 1, 1977, is because the salary increase they received on that day placed them in the same (indeed, in a better) position than they would have been in had the challenged diminution in compensation never occurred. Here, in contrast, the effect of the Social Security taxes has been to reduce the plaintiff judges' compensation

---

[13] The government asserted below that "it is clear from the material the judges cite . . . that, in the 1920s, it was believed *Evans* effectively banned *any* taxation of judges' compensation." Defendant-Appellee's Opening Brief at 32, *Hatter VII* (emphasis in original). This is incorrect. An Opinion of the Attorney General, issued in the wake of *Evans*, opined that the salaries of judges appointed *after* the enactment of the income tax statute at issue in *Evans* were taxable. 32 Op. Att'y Gen. 248 (1920). It was not until some five years later that the Supreme Court concluded in *Miles* that income taxes could not be applied to Article III judges appointed after the tax was enacted. Thus, at the time of the 1919 salary increase, there was no understanding that "*Evans* effectively banned *any* taxation of judges' compensation."

each year to a level below the compensation they would have received but for the enactment of the challenged statutes.

4. The government's other arguments with respect to the remedial issues are meritless. The Federal Circuit did not state, as the government contends, that a Compensation Clause violation continued despite general judicial salary increases "because . . . a different rule would create two classes of judges." Pet. at 27. The Federal Circuit instead observed that the *government's* position created two classes of judges, one that would enjoy the full benefit of any general salary increases and, a second, that would have to net out its damages from the general salary increases. Pet. App. 122a. The government is also wrong when it charges that the Federal Circuit's ruling creates "two classes of judges with different compensation packages." Pet. at 28. If two classes of judges were created, it was Congress that did so when it diminished judicial compensation in 1983. The potential for judges with differing compensation inheres within a constitutional guarantee that protects only prior-appointed judges from the effects of a lowering of judicial compensation.

IV. THE RULINGS BELOW HAVE LIMITED PRECEDENTIAL AND REMEDIAL IMPLICATIONS

1. The petition suggests that the court of appeals' decisions have significance well beyond the facts of this case, yet in more than 200 years of constitutional interpretation, this is only the second case to raise before this Court the issue of whether the Compensation Clause prohibits the imposition of a new federal tax on sitting Article III judges. Because the court of appeals' decisions affect only those Article III judges who accepted their appointments prior to January 1, 1984, their remedial

implications are of limited scope and duration. Indeed, Congress could readily cure the constitutional defect found in *Hatter IV* in a number of different ways, including giving Article III judges the option whether or not to participate in the Social Security and Medicare programs.

2. The government argues that review is needed because the reasoning of the court of appeals' decisions suggest that "Congress would effectively be required either (a) to freeze the rate of any tax applicable to judicial salaries to the rate in effect when each judge was appointed, or (b) to subject federal judicial salaries only to the lowest income tax rate that was applicable when any sitting member of the judiciary first took office." Pet. at 28 n.26. In the 75 years since *Evans v. Gore* was decided, this claim has never been made, and the court of appeals' decision lends no support to such a claim. The distinction between *O'Malley* and *Evans*, as the court observed, is that a judge who is appointed *after* a tax is enacted accepts the appointment with knowledge that the specified compensation will be subject to the tax. Pet App. 60a. Indeed, in *O'Malley*, the Court emphasized that the income tax statute "gave notice to all judges thereafter to be appointed, of the new Congressional policy to include the judicial salaries of such judges in the assessment of income taxes." 307 U.S. at 279. A judge who accepts an appointment subject to a tax necessarily accepts the prospect that the rate of tax may change. Unless a tax rate is changed in a discriminatory manner with respect to Article III judges, the change will apply equally to judicial compensation and private compensation, and will pose no potential threat to judicial independence or competence. The court of appeals' decision does not hold otherwise.

CONCLUSION

If a quorum is unavailable to hear this case, the judgment of the Federal Circuit should be affirmed pursuant to 28 U.S.C. § 2109, or alternatively, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Of Counsel

ELLEN E. DEASON
Associate Professor of Law
University of Illinois
College of Law
504 East Pennsylvania Ave.
Champaign, IL 61820
Telephone: (217) 333-1286

W. STEPHEN SMITH
Counsel of Record
MORRISON & FOERSTER LLP
2000 Pennsylvania
Ave., N.W.
Washington, D.C.
20006-1888
Telephone: (202) 887-1500
Facsimile: (202) 887-0763

STEVEN S. ROSENTHAL
DOUGLAS A. TUCKER
COOPER, CARVIN &
ROSENTHAL, PLLC
1500 K Street, NW
Suite 200
Washington, DC 20005
Telephone: (202) 220-9600
Facsimile: (202) 220-9601

Attorneys for Respondents

Dated: August 9, 2000

APPENDIX

APPENDIX A

FEDERAL EMPLOYEES' RETIREMENT CONTRIBUTION TEMPORARY ADJUSTMENT ACT OF 1983

5 U.S.C. § 8331 note

FEDERAL EMPLOYEES' RETIREMENT CONTRIBUTION TEMPORARY ADJUSTMENT

Pub. L. 98-168, title II, Nov. 29, 1983, 97 Stat. 1106, as amended Pub. L. 99-190, § 147, Dec. 19, 1985, 99 Stat. 1324; Pub. L. 99-335, title III, §§ 305(a), 309, June 6, 1986, 100 Stat. 606, 607, provided that:

"SHORT TITLE

"Sec. 201. This title may be cited as the 'Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983'.

"STATEMENT OF POLICY

"Sec. 202. It is the policy of the Government–

"(1) that the amount required to be contributed to certain public retirement systems by employees and officers of the Government who are also required to pay employment taxes relating to benefits under title II of the Social Security Act [42 U.S.C. 401 et seq.] for service performed after December 31, 1983, be modified until the date on which such employees and officers are covered by a new Government retirement system (the design, structure, and provisions of which have not been

determined on the date of enactment of this Act [Nov. 29, 1983]), or January 1, 1987, whichever is earlier;

"(2) that the Treasury be required to pay into such retirement systems the remainder of the amount such employees and officers would have contributed during such period but for the temporary modification;

"(3) that the employing agencies make contributions to the retirement systems with respect to such service in amounts required by law in effect before January 1, 1984, without reduction in such amounts;

"(4) that such employees and officers accrue credit for service for the purposes of the public retirement systems in effect on the date of enactment of this Act [Nov. 29, 1983] until a new Government retirement system covering such employees and officers is established;

"(5) that, where appropriate, deposits to the credit of such a retirement system be required with respect to service performed by an employee or officer of the Government during the period described in clause (1), and, where appropriate, annuities be offset by the amount of certain social security benefits attributable to such service; and

"(6) that such employees and officers who are first employed in civilian service by the Government or first take office in civilian service in the Government on or after January 1, 1984, become subject to such new Government retirement system as may be established for employees and officers of the Government on or after January 1, 1984, and before January 1, 1987, with credit for service performed after December 31, 1983, by such employees and officers transferred to such new Government retirement system.

"DEFINITIONS

"Sec. 203. (a) For the purposes of this title–

"(1) the term 'covered employee' means any individual whose service is covered service;

"(2) the term 'covered retirement system' means–

"(A) the Civil Service Retirement and Disability System under subchapter III of chapter 83 of title 5, United States Code;

"(B) the Foreign Service Retirement and Disability System under chapter 8 of the Foreign Service Act of 1980 (22 U.S.C. 4041 et seq.);

"(C) the Central Intelligence, Agency Retirement and Disability System under the Central Intelligence Agency Retirement Act of 1964 for Certain Employees (50 U.S.C. 403 note); and

"(D) any other retirement system (other than a new Government retirement system) under which a covered employee who is a participant in the system is required to make contributions to the system in an amount equal to a portion of the participant's basic pay for covered service, as determined by the President.

"(3) the term 'covered service' means service which is employment for the purposes of title II of the Social Security Act [42 U.S.C. 401 et seq.] and chapter 21 of the Internal Revenue Code of 1986 [26 U.S.C. 3101 et seq.] by reason of the amendments made by section 101 of the Social Security Amendments of 1983 (97 Stat. 67) [amending section 3121 of Title 26, Internal Revenue Code, and sections 409 and 410 of Title 42, The Public Health and Welfare, and enacting provisions set out as

notes under section 3121 of Title 26 and section 410 of Title 42]; and

"(4) the term 'new Government retirement system' means any retirement system which (A) is established for officers or employees of the Government by or pursuant to a law enacted after December 31, 1983, and before January 1, 1987, and (B) takes effect on or before January 1, 1987.

"(b) The President shall publish the determinations made for the purpose of subsection (a)(2)(D) in an Executive order.

"CONTRIBUTION ADJUSTMENTS

"Sec. 204. (a) In the case of a covered employee who is participating in a covered retirement system, an employing agency shall deduct and withhold only 1.3 percent of the basic pay of such employee under–

"(1) section 8334 of title 5, United States Code;

"(2) section 805 of the Foreign Service Act of 1980 (22 U.S.C. 4045);

"(3) section 211 of the Central Intelligence Agency Retirement Act of 1964 for Certain Employees (50 U.S.C. 403 note); or

"(4) any provision of any other covered retirement system which requires a participant in the system to make contributions of a portion of the basic pay of the participant;

for covered service which is performed after December 31, 1983, and before the earlier of the effective date of a new Government retirement system or January 1, 1987. Deductions shall be made and withheld as provided by such provisions in the case of covered service which is performed

on or after such effective date or January 1, 1987, as the case may be, and is not subject to a new Government retirement system.

"(b) Employing agencies of the Government shall make contributions with respect to service to which subsection (a) of this section applies under the second sentence of section 8334(a)(1) of title 5, United States Code the second sentence of section 805(a) of the Foreign Service Act of 1980 (22 U.S.C. 4045(a)), the second sentence of section 211(a) of the Central Intelligence Agency Retirement Act of 1964 for Certain Employees (50 U.S.C. 403 note), and any provision of any other covered retirement system requiring a contribution by the employing agency, as if subsection (a) of this section had not been enacted.

"REIMBURSEMENT FOR CONTRIBUTION DEFICIENCY

"Sec. 205. (a) For purposes of this section–

"(1) the term 'contribution deficiency', when used with respect to a covered retirement system, means the excess of–

"(A) the total amount which, but for section 204(a) of this Act, would have been deducted and withheld under a provision referred to in such section from the pay of covered employees participating in such retirement system for service to which such section applies, over

"(B) the total amount which was deducted and withheld from the pay of covered employees for such service as provided in section 204(a) of this Act; and

"(2) the term 'appropriate agency head' means–

"(A) the Director of the Office of Personnel Management, with respect to the Civil Service Retirement and Disability System under subchapter III of chapter 83 of title 5, United States Code;

"(B) the Secretary of State, with respect to the Foreign Service Retirement and Disability System under chapter 8 of the Foreign Service Retirement Act of 1980 (22 U.S.C. 404 et seq.) [22 U.S.C. 4041 et seq.];

"(C) the Director of Central Intelligence, with respect to the Central Intelligence Agency Retirement and Disability System under the Central Intelligence Agency Retirement Act (50 U.S.C. 403 note); and

"(D) the officer designated by the President for that purpose in the case of any retirement system described in section 203(a)(2)(D) of this Act.

"(b) At the end of each of fiscal years 1984, 1985, 1986, and 1987 the appropriate agency head–

"(1) shall determine the amount of the contribution deficiency for such fiscal year in the case of each covered retirement system, including the interest that those contributions would have earned had they been credited to the fund established for the payment of benefits under such retirement system in the same manner and at the same time as deductions under the applicable provision of law referred to in section 204(a) of this Act; and

"(2) shall notify the Secretary of the Treasury of the amount of the contribution deficiency in each such case.

"(c) Before closing the accounts for each of fiscal years 1984, 1985, 1986, and 1987, the Secretary of the Treasury shall credit to the fund established for the payment of

benefits under each covered retirement system, as a Government contribution, out of any money in the Treasury not otherwise appropriated, an amount equal to the amount determined under subsection (b) with respect to that covered retirement system for the fiscal year involved.

"(d) Amounts credited to a fund under subsection (c) shall be accounted for separately than amounts credited to such fund under any other provision of law.

"SPECIAL DEPOSIT AND OFFSET RULES RELATING TO RETIREMENT BENEFITS FOR INTERIM COVERED SERVICE

"Sec. 206. (a) For the purposes of this section, the term 'interim covered service' means covered service to which section 204(a) applies.

"(b)(1) Paragraphs (2) and (3) apply according to the provisions thereof only with respect to a covered employee who is employed by the Government on December 31, 1983.

"(2)(A) Notwithstanding any other provision of law, the interim covered service of such covered employee shall be considered–

"(i) in determining entitlement to and computing the amount of any annuity (other than a disability or survivor annuity) commencing under a covered retirement system during the period beginning January 1, 1984, and ending on the earlier of the date a new Government retirement system takes effect or January 1, 1987, by reason of the retirement of such covered employee during such period only if such covered employee makes a deposit to the credit of such covered retirement system for such covered

service in an amount computed as provided in subsection (f); and

"(ii) in computing a disability or survivor annuity which commences under a covered retirement system during such period and is based in any part on such interim covered service.

"(B) Notwithstanding any other provision of law, an annuity to which subparagraph (A)(ii) applies shall be reduced by the portion of the amount of any benefits which is payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] and is attributable to the interim covered service considered in computing the amount of such annuity, as determined under subsection (g), unless, in the case of a survivor annuity, a covered employee has made a deposit with respect to such covered service for the purposes of subparagraph (A)(i) before the date on which payment of such annuity commences.

"(3) Notwithstanding any other provision of law, if a new Government retirement system is not established or is inapplicable to such a covered employee who retires or dies subject to a covered retirement system after the date on which such new Government retirement system takes effect, the interim covered service of such covered employee shall be considered in determining entitlement to and computing the amount of an annuity under a covered retirement system based on the service of such covered employee only if such covered employee makes a deposit to the credit of such covered retirement system for such covered service in an amount computed as provided in subsection (f).

"(c)(1) Paragraphs (2) and (3) apply according to the provisions thereof only with respect to a covered employee

who was not employed by the Government on December 31, 1983.

"(2) Notwithstanding any other provision of law, any annuity which commences under a covered retirement system during the period described in subsection (b)(2)(A)(i) and is based, in any part, on interim covered service shall be reduced by the portion of the amount of any benefits which is payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] to the annuitant and is attributable to such service, as determined under subsection (g).

"(3) Notwithstanding any other provision of law, if a new Government retirement system is not established, the interim covered service of such a covered employee who retires or dies after January 1, 1987, shall be considered in determining entitlement to and computing the amount of an annuity under a covered retirement system based on the service of such covered employee only if such covered employee makes a deposit to the credit of such covered retirement system for such covered service in an amount computed as provided in subsection (f).

"(d) If a covered employee with respect to whom subsection (b)(3) or (c)(3) applies dies without having made a deposit pursuant to such subsection, any individual who is entitled to an annuity under a covered retirement system based on the service of such covered employee or who would be entitled to such an annuity if such deposit had been made by the covered employee before death may make such deposit after the date of death of such covered employee. Service covered by a deposit made pursuant to the first sentence shall be considered in determining, in the case of each individual to whom the first sentence applies, the entitlement to and the amount of an annuity under a covered

retirement system based on the service of such covered employee.

"(e) A reduction in annuity under subsection (b)(2)(B) or (c)(2) shall commence on the first day of the first month after the date on which payment of benefits under title II of the Social Security Act [42 U.S.C. 401 et seq.] commence and shall be redetermined each time an increase in such benefits takes effect pursuant to section 215(i) of the Social Security Act [42 U.S.C. 415(i)]. In the case of an annuity of a participant or former participant in a covered retirement system, of a surviving spouse or child of such participant or former participant, or of any other person designated by such participant or former participant to receive an annuity, under a covered retirement system (other than a former spouse) the reduction in annuity under subsection (b)(2)(B) or (c)(2) shall be calculated before any reduction in such annuity provided under such system for the purpose of paying an annuity under such system to any former spouse of such participant or former participant based on the service of such participant or former participant.

"(f) For the purposes of subsection (b) or (c), the amount of a deposit to the credit of the applicable covered retirement system shall be equal to the excess of–

"(1) the total amount which would have been deducted and withheld from the basic pay of the covered employee for the interim covered service under such covered retirement system but for the application of section 204(a), over

"(2) the amount which was deducted and withheld from such basic pay for such interim covered service pursuant to section 204(a) and was not refunded to such covered employee.

"(g) For the purpose of subsections (b)(2)(B) and (c)(2), the portion of the amount of the benefits which is payable under title II of the Social Security Act [42 U.S.C. 401 et seq.] to an individual and is attributable to interim covered service shall be determined by–

"(1) computing the amount of such benefits including credit for such service;

"(2) computing the amount of such benefits, if any, without including credit for such service; and

"(3) subtracting the amount computed under clause (2) from the amount computed under clause (1).

"(h) The Secretary of Health and Human Services shall furnish to the appropriate agency head (as defined in section 205(a)(2)) such information as such agency head considers necessary to carry out this section.

"TRANSFER OF CREDIT TO NEW RETIREMENT SYSTEM

"Sec. 207 [Repealed. Pub.L. 99-335, Title III, § 309, June 6, 1986, 100 Stat. 607]

"ELECTIONS BY CERTAIN COVERED EMPLOYEES

"Sec. 208. (a) Any individual performing service of a type referred to in clause (i), (ii), (iii), or (iv) of section 210(a)(5) of the Social Security Act [42 U.S.C. 410(a)(5)(i)-(iv)] beginning on or before December 31, 1983, may–

"(1) if such individual is then currently a participant in a covered retirement system, elect by written application submitted before January 1, 1984–

"(A) to terminate participation in such system, effective after December 31, 1983; or

"(B) to remain under such system, as if the preceding sections of this Act and the amendments made by this Act had not been enacted; or

"(2) if such individual is then currently not a participant in a covered retirement system, elect by written application–

"(A) to become a participant under such system (if such individual is otherwise eligible to participate in the system), subject to the preceding sections of this Act and the amendments made by this Act; or

"(B) to become a participant under such system (if such individual is otherwise eligible to participate in the system), as if the preceding sections of this Act and the amendments made by this Act had not been enacted.

"(b) An application by an individual under subsection (a) shall be submitted to the official by whom such covered employee is paid.

"(c) Any individual who elects to terminate participation in a covered retirement system under subsection (a)(1)(A) is entitled to have such individual's contributions to the retirement system refunded, in accordance with applicable provisions of law, as if such individual had separated from service as of the effective date of the election.

"(d) Any individual who is eligible to make an election under subparagraph (A) or (B) of subsection (a)(1), but who does not make an election under either such subparagraph, shall be subject to the preceding sections of this Act and the amendments made by this Act."

[Amendment to section 206(c)(3) of Pub. L. 98-168 by section 305(a)(1) of Pub.L. 99-335 directing the substitution

of "January 1, 1987" for "January 1, 1986" has been executed by substituting "January 1, 1987" for "April 30, 1986" as the probable intent of Congress.]

[Section 305(b) of Pub.L. 99-335 provided that:

"(1) The amendments made by subsection (a) [amending Pub.L. 98-168 set out above] shall be effective as of May 1, 1986.

"(2) Any refund payable to an individual as a result of paragraph (1) shall be paid out of funds of the appropriate retirement system.

"(3) For purposes of this subsection, the term 'retirement system' means a covered retirement system as defined by section 203(a)(2) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (97 Stat. 1107; 5 U.S.C. 8331 note)."]

APPENDIX B

DEFICIT REDUCTION ACT OF 1984, SECTION 2206

5 U.S.C. § 8331 note

ELECTION OF RETIREMENT PLAN UNDER FEDERAL EMPLOYEES' RETIREMENT CONTRIBUTION TEMPORARY ADJUSTMENT ACT OF 1983

Pub. L. 98-369, div. B, title II, § 2206, July 18, 1984, 98 Stat. 1059, provided that:

"(a) For the purposes of this section, the term, 'covered retirement system' shall have the same meaning as provided in section 203(a)(2) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (Public Law 98-168; 97 Stat. 1107) [set out below].

"(b)(1) Any individual who was entitled to make an election under section 208(a) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (97 Stat. 1111) [set out below], but who did not make such an election, may make an election under such section not later than September 15, 1984.

"(2)(A) Not later than September 15, 1984, any such individual who made an election under paragraph (1) of section 208(a) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 [set out bleow] may–

"(i) make any other election which such individual was entitled to make under such section before January 1, 1984; or

"(ii) elect to become a participant in a covered retirement system (if such individual is otherwise eligible to participate in such system), subject to sections 201 through 207 of such Act [set out below].

"(B) Not later than September 15, 1984, any such individual who made an election under paragraph (2) of section 208(a) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 may–

"(i) make any other election which such individual was entitled to make under such section before January 1, 1984; or

"(ii) elect to terminate participation in the covered retirement system with respect to which such individual made the election under such paragraph (2).

"(3) An election under this subsection shall be made by a written application submitted to the official by whom the electing individual is paid.

"(4) An election made as provided in this subsection shall take effect with respect to service performed on or after the first day of the first applicable pay period commencing after September 15, 1984.

"(c)(1) Section 8342(a)(4) of title 5, United States Code, does not apply for the purpose of determining an entitlement to a refund under section 208(c) of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (97 Stat. 1111) [set out below].

"(2) Paragraph (1) shall take effect with respect to any election made under section 208(a) of such Act or this Act before, on, or after January 1, 1984.

"(d) Nothing in this section or the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 [set out below] affects any entitlement to benefits accrued under a covered retirement system before January 1, 1984, except to the extent that any amount refunded under section 208(c) of such Act is not redeposited in the applicable retirement fund."

APPENDIX C

FEDERAL EMPLOYEES' RETIREMENT SYSTEM ACT OF 1986

5 U.S.C. § 8331 note

ELECTION OF COVERAGE UNDER CHAPTER 84

Sections 301 to 303 of Pub.L. 99-335, as amended by Pub. L. 99-556, title III, §§ 301, 302, Oct. 27, 1986, 100 Stat. 3135, 3136; Pub. L. 100-20, § 1(a), April 7, 1987, 101 Stat. 265; Pub. L. 100-238, title I, §§ 106, 107, 113(a)(1), 118, 119, 134(b), (c), Jan. 8, 1988; 101 Stat. 1746, 1747, 1750, 1752, 1764, 1765, provided that:

"SEC. 301. ELECTIONS.

"(a) ELECTIONS FOR INDIVIDUALS SUBJECT TO THE CIVIL SERVICE RETIREMENT SYSTEM.–(1)(A) Any individual (other than an individual under subsection (b)) who, as of June 30, 1987, is employed by the Federal Government, and who is then subject to subchapter III of chapter 83 of title 5, United States Code, may elect to become subject to chapter 84 of such title.

"(B) An election under this paragraph may not be made before July 1, 1987, or after December 31, 1987.

"(2)(A) Any individual who, after June 30, 1987, becomes reemployed by the Federal Government, and who is then subject to subchapter III of chapter 83 of title 5, United States Code, may elect to become subject to chapter 84 of such title.

"(B) An election under this paragraph shall not be effective unless it is made during the six-month period beginning on the date on which reemployment commences.

"(3)(A) Except as provided in subparagraph (B), any individual–

> "(i) who is excluded from the operation of subchapter III of chapter 83 of title 5, United States Code, under subsection (g), (i), (j), or (*l*) of section 8347 of such title, and
>
> "(ii) with respect to whom chapter 84 of title 5, United States Code, does not apply because of section 8402(b)(2) of such title,

shall, for purposes of an election under paragraph (1) or (2), be treated as if such individual were subject to subchapter III of chapter 83 of title 5, United States Code.

"(B) An election under this paragraph may not be made by any individual who would be excluded from the operation of chapter 84 of title 5, United States Code, under section 8402(c) of such title (relating to exclusions based on the temporary or intermittent nature of one's employment).

"(4) A member of the Foreign Service described in section 103(6) of the Foreign Service Act of 1980 [22 U.S.C. 3903(6)] shall be ineligible to make any election under this subsection.

"(b) ELECTIONS FOR CERTAIN INDIVIDUALS SERVING CONTINUOUSLY SINCE DECEMBER 31, 1983.–The following rules shall apply in the case of any individual described in section 8402(b)(1) of title 5, United States Code:

"(1) If, as of December 31, 1986, the individual is subject to subchapter III of chapter 83 of title 5, United States Code, but is not subject to section 204 of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 [section 204 of Pub.L. 98-168, set out below], the individual shall remain so subject to such subchapter unless the individual elects, after June 30, 1987, and before January 1, 1988–

> "(A) to become subject to such subchapter under the same terms and conditions as apply in the case of an individual described in section 8402(b)(2) of such title [section 8402(b)(2) of this title] who is subject to such subchapter; or
>
> "(B) to become subject to chapter 84 of such title.

An individual eligible to make an election under this paragraph may make the election described in subparagraph (A) or (B), but not both.

"(2) If, as of December 31, 1986, the individual is subject to subchapter III of chapter 83 of title 5, United States Code, and is also subject to section 204 of the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 [set out below], the individual–

> "(A) shall, as of January 1, 1987, become subject to such subchapter under the same terms and conditions as apply in the case of an individual described in section 8402(b)(2) of such title who is subject to such subchapter; and
>
> "(B) may (during the six-month period described in subsection (a)(1)(B)) elect to become subject to chapter 84 of such title.

"(3)(A) If, as of December 31, 1986, the individual is not subject to subchapter III of chapter 83 of title 5, United States Code, such individual may, during the 6-month period described in subsection (a)(1)(B)–

"(i) elect to become subject to chapter 84 of such title; or

"(ii) if such individual has not since made an election described in subparagraph (B), elect to become subject to subchapter III of chapter 83 of such title under the same terms and conditions as apply in the case of an individual described in section 8402(b)(2) of such title who is subject to such subchapter.

"(B) Nothing in this paragraph shall be considered to preclude the individual from electing to become subject to subchapter III of chapter 83 of such title pursuant to notification under section 8331(2) of such title–

"(i) during the period after December 31, 1986, and before July 1, 1987; or

"(ii) after December 31, 1987, if such individual has not since become subject to subchapter III of chapter 83, or chapter 84, of such title.

"(C) Any individual who becomes subject to subchapter III of chapter 83 of such title pursuant to notification under section 8331(2) of such title after December 31, 1986, shall become subject to such subchapter under the same terms and conditions as apply in the case of an individual described in section 8402(b)(2) of such title who is subject to such subchapter.

APPENDIX D

DISQUALIFICATION OF JUSTICE, JUDGE, OR MAGISTRATE

28 U.S.C. § 455

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other

interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as

director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

(f) Notwithstanding the preceding provisions of this section, if any justice, judge, magistrate, or bankruptcy judge to whom a matter has been assigned would be disqualified, after substantial judicial time has been devoted to the matter, because of the appearance or discovery, after the matter was assigned to him or her, that he or she individually or as a fiduciary, or his or her spouse or minor child residing in his or her household, has a financial interest in a party (other than an interest that could be substantially affected by the outcome), disqualification is not required if the justice, judge, magistrate, bankruptcy judge, spouse or minor child, as the case may be, divests himself or herself of the interest that provides the grounds for the disqualification.

(June 25, 1948, c. 646, 62 Stat. 908; Dec. 5, 1974, Pub. L. 93-512, § 1, 88 Stat. 1609; Nov. 6, 1978, Pub. L. 95-598, title I, § 214(a), (b), 92 Stat. 2661; Nov. 19, 1988, Pub. L. 100-702, title X, § 1007, 102 Stat. 4667.)

APPENDIX E

QUORUM OF SUPREME COURT JUSTICES ABSENT

28 U.S.C.A. § 2109

If a case brought to the Supreme Court by direct appeal from a district court cannot be heard and determined because of the absence of a quorum of qualified justices, the Chief Justice of the United States may order it remitted to the court of appeals for the circuit including the district in which the case arose, to be heard and determined by that court either sitting in banc or specially constituted and composed of the three circuit judges senior in commission who are able to sit, as such order may direct. The decision of such court shall be final and conclusive. In the event of the disqualification or disability of one or more of such circuit judges, such court shall be filled as provided in chapter 15 of this title.

In any other case brought to the Supreme Court for review, which cannot be heard and determined because of the absence of a quorum of qualified justices, if a majority of the qualified justices shall be of opinion that the case cannot be heard and determined at the next ensuing term, the court shall enter its order affirming the judgment of the court from which the case was brought for review with the same effect as upon affirmance by an equally divided court.

(June 25, 1948, c. 646, 62 Stat. 963.)

(4)

Supreme Court, U.S.
FILED
AUG 24 2000

No. 99-1978

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

BEST AVAILABLE COPY

13pp

TABLE OF CONTENTS

	Page
1. Recusal/Quorum	1
2. Law of the case	4
3. Merits	5
4. Termination of constitutional violation	9

TABLE OF AUTHORITIES

Cases:	
Durant v. *Essex Co.*, 74 U.S. (7 Wall.) 107 (1868)	4
Evans v. *Gore*:	
262 F. 550 (W.D. Ky. 1919), rev'd, 253 U.S. 245 (1920)	2
253 U.S. 245 (1920)	1, 2, 7
Miles v. *Graham*, 268 U.S. 501 (1925)	5
O'Malley v. *Woodrough*, 307 U.S. 277 (1939)	5
Pollock v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)	7
State ex rel. Mitchell v. *Sage Stores Co.*, 143 P.2d 652 (Kan. 1943), aff'd, 323 U.S. 32 (1944)	2
United States v. *Will*, 449 U.S. 200 (1980)	1, 2, 6
Constitution and statutes:	
U.S. Const.:	
Art. II, § 1, Cl. 7	6
Art. III, § 1 (Compensation Clause)	1, 4, 5, 6, 7, 9
Amend. XVI	7
Amend. XXVII	6
Act of May 22, 1920, ch. 195, 41 Stat. 614	8
5 U.S.C. 719 (1925)	8
26 U.S.C. 3101(a)	5
26 U.S.C. 3101(b)	5
26 U.S.C. 3121(b) (1994 & Supp. III 1997)	8
28 U.S.C. 371 (1994 & Supp. III 1997)	9

Statutes:	Page
28 U.S.C. 455	1, 2
28 U.S.C. 455(b)(4)	3
28 U.S.C. 2109	4
Miscellaneous:	
Biographical Dictionary of the Federal Judiciary (Harold Chase et al., comp. 1976)	2
58 Cong. Rec. 7969 (1919)	2
1 *Debates and Proceedings in the Congress of the United States* (Joseph Gales comp. 1789)	6

In the Supreme Court of the United States

No. 99-1978

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. *Recusal/Quorum.* Respondents acknowledge (Br. in Opp. 14) that the Rule of Necessity permits a Justice to participate in a case, even if that Justice might be disqualified under 28 U.S.C. 455, when recusal would deny "litigants a fair forum in which they can pursue their claims." *United States* v. *Will*, 449 U.S. 200, 217 (1980). That is precisely the situation in this case. Only this Court can entertain the government's argument that this Court's decision in *Evans* v. *Gore*, 253 U.S. 245 (1920), no longer represents the proper interpretation of the Compensation Clause, Art. III, § 1, and should therefore be definitively overruled.

The court of appeals ruled that it was bound to follow *Evans* (see Pet. App. 59a-61a), and on that basis it held two Acts of Congress unconstitutional. But if a quorum of this Court is not available to review that decision, then the

United States will be deprived of the opportunity to argue to the only competent forum that *Evans* is no longer good law. Thus, even if Section 455 might indicate recusal by one or more Justices, the Rule of Necessity permits all the Justices to hear and decide this case. See *State ex rel. Mitchell* v. *Sage Stores Co.*, 143 P.2d 652, 656 (Kan. 1943) ("[I]t is well established that actual disqualification of a member of a court of last resort will not excuse such member from performing his official duty if failure to do so would result in a denial of a litigant's constitutional right to have a question, properly presented to such court, adjudicated.") (quoted with approval in *Will*, 449 U.S. at 214), aff'd on other grounds, 323 U.S. 32 (1944).[1]

---

[1] Respondents mistakenly state (Br. in Opp. 14) that *Will* held that the Rule of Necessity applies *only* when all Article III judges have an interest in the outcome of the case. In fact, while *Will* held that the Rule of Necessity does apply in that situation, it did not hold that the Rule applies *only* in such a case. Indeed, *Will's* approving quotation of *Sage Stores*, discussed in the text, suggests otherwise, because the Kansas Supreme Court stated there that the Rule applies when disqualification would prevent the "court of last resort" from hearing a case. Similarly, in *Evans* v. *Gore*, this Court stated that it would hear the case because, once the district court rejected the plaintiff judge's Compensation Clause claim, "there was no other *appellate tribunal* to which under the law he could go." 253 U.S. at 248 (emphasis added). In *Will*, the Court indicated that *Evans* had applied the Rule of Necessity. See 449 U.S. at 215 & n.18.

That point about *Evans* is particular noteworthy because, under respondents' understanding of *Evans*, the district judge who heard that case was not disqualified to do so. Respondents maintain (Br. in Opp. 17-18) that the issue in *Evans* was the constitutionality of applying the income tax to the salaries of already-sitting federal judges. The case involved a federal statute imposing taxes on income, including federal judges' salaries, enacted on February 24, 1919. See 253 U.S. at 246. District Judge Peck, however, was appointed later in 1919, after the income tax on judicial salaries had already taken effect. See 58 Cong. Rec. 7969 (1919); *Biographical Dictionary of the Federal Judiciary* 217 (Harold Chase et al., comp. 1976); *Evans* v. *Gore*, 262 F. 550, 550 (W.D. Ky. 1919), rev'd, 253 U.S. 245 (1920). Even respondents would agree, therefore, that

Moreover, respondents notably do not argue that a quorum of the Court is lacking on the ground that at least four Justices *currently* have a financial interest in this case. Section 455(b)(4), however, speaks unmistakably in the present tense, requiring disqualification if a Justice "*has* a financial interest in the subject matter in controversy or in a party to the proceeding." (Emphasis added.) Thus, a Justice is disqualified at this point only if he or she *has* a financial interest in *this* proceeding—*i.e.*, *this* certiorari petition, not a past one.

Respondents rely instead (Br. in Opp. 13) on a rule of practice developed in the lower courts, that once a district judge recuses himself from a case, that judge may issue no further substantive rulings in the case. The cases cited by respondents, however, do not involve a situation like this one, where a case returns to a court after further proceedings in a lower court, and where changed circumstances have terminated the basis for disqualifications that led to recusals on the prior petition. In addition, the rule of practice respondents invoke reflects the understanding that once a district judge removes himself from a case, the case is simply no longer before that judge; it also reflects the fact that many other district judges will usually be available to hear the case. Neither rationale is applicable to recusal in this Court, a multi-member appellate court with the responsibility for making final determinations about the constitutionality of federal statutes.

Judge Peck's compensation could not have been "diminished" by the application of the income tax act to judicial salaries, see Br. in Opp. 18 n.10, and so Judge Peck could not have had an interest in the case. Thus, if respondents' understanding of the Rule of Necessity (that it applies only when *every* judge has an interest in the case) were correct, this Court should not have decided *Evans* on the merits—especially since every Justice of this Court then sitting had been appointed before the 1919 income tax statute under review took effect. See 253 U.S. at iv (allotment of Justices to Circuits from 1916).

2. *Law of the Case.* Respondents acknowledge (Br. in Opp. 15) that this Court is not barred from considering the merits of the Compensation Clause issue in this case by its prior order entered under 28 U.S.C. 2109, affirming the judgment of the court of appeals for lack of a quorum. Respondents note that in *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868), the Court stated that a final judgment affirmed by this Court in a tie vote is "conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." In *Durant*, however, the Court was considering the res judicata effect of a final circuit court decree dismissing a bill in equity, which an equally divided Court had affirmed. *Id.* at 109. The Court held that the decree was to be treated as final, just as would have been the case if it had been affirmed in a reasoned opinion or if the appeal had been dismissed. *Id.* at 112. That statement in *Durant* is inapposite here because the Court was not there considering the effect of an affirmance of an interlocutory order—which of course is not entitled to res judicata effect—nor was it considering the effect of an order affirming a lower-court judgment for lack of a quorum—which, unlike a tie-vote affirmance, is entered by operation of law and does not reflect consideration of the merits of the case by the Court. The Court's order of affirmance entered on our prior certiorari petition did not reflect any judgment by this Court about the merits of the controversy and so does not prevent the government from raising the Compensation Clause issue again in this Court.[2]

---

[2] Respondents also state, without citation (Br. in Opp. 16-17), that after this Court's affirmance of the Federal Circuit's earlier decision, the Administrative Office of the United States Courts (AOUSC) offered the affected judges the option to discontinue the challenged tax deductions into the future. The Department of Justice, however, did not advise AOUSC that it could do so, and the fact that AOUSC may have decided to do so without waiting for the courts to enter final judgment in this case is hardly a reason to prevent the United States from pressing its arguments to this Court. Nor has Congress authorized AOUSC to cease the Social Security tax deductions from respondents' salaries. We also note that even respondents have never argued that Congress was prohibited by the Compensation Clause from subjecting their salaries to Social Security taxes; respondents have argued, rather, that when Congress imposed such taxes on them, Congress was also required to compensate them for the incidence of the tax on their salaries. (That point explains why the Federal Circuit ruled at an earlier stage of this litigation that respondents were not required to abide by the procedural requirements of a tax-refund suit. See Pet. App. 26a.) It is not clear, therefore, by what warrant AOUSC may have ceased the deductions.

3. *Merits.*

a. Respondents press their argument (Br. in Opp. 17-20) that the Constitution's reference to judges' "Compensation" in Article III must mean their salary net of taxes, and so any new taxation of sitting judges' salaries is unconstitutional. But as we noted in our petition (Pet. 28 n.26), if respondents' understanding of "Compensation" is correct, then it is difficult to see why the Clause would not also prohibit Congress from increasing the rate of income tax on sitting judges, or imposing a special surtax. Respondents assert (Br. in Opp. 29) that there simply is a difference between a new tax and an increased tax, but they do not explain why, or how one might distinguish in principle between the two. Indeed, Social Security taxes are merely a kind of income tax. See 26 U.S.C. 3101(a) and (b) (imposing Social Security taxes "on the income of every individual").[3]

---

[3] Respondents observe (Br. in Opp. 29) that no judge has yet brought suit challenging the application of a tax increase to judicial salaries. While it is impossible to state with certainty why such a suit has not yet been brought, we suggest that, before this Court decided *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), the Court's decision in *Evans* was generally read to hold that Congress could not impose income taxes on judicial salaries at all (see *Miles* v. *Graham*, 268 U.S. 501 (1925)), whereas after *O'Malley*, it was generally understood that *Evans* had been interred and that the imposition of generally applicable income taxes on judicial

Respondents' understanding of "Compensation," moreover, creates further serious textual problems. The Constitution provides that the President "shall receive for his Services, a Compensation, which shall neither be *increased nor diminished* during the Period for which he shall have been elected." U.S. Const. Art. II, § 1, Cl. 7 (emphasis added). Under respondents' understanding of "Compensation," Congress could not eliminate or reduce any tax on the President's salary while he was in office, even if that elimination or reduction were generally applicable to all citizens, because such an action would "increase[]" the President's compensation net of taxes. The Twenty-seventh Amendment also provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. Const. Amend. XXVII.[4] Thus, in respondents' view, Congress could not immediately impose new taxes or increase taxes on its own Members' salaries, even if it did so with respect to the general population, because such an action would "vary[] the compensation" of Senators and Representatives. Respondents' textual analysis therefore leads to the conclusion that, when Congress adjusts income taxes, it is required either to discriminate *against* the President (if reducing rates) or *in favor of* itself (if raising rates). This implausible result demonstrates that

---

salaries did not implicate the Compensation Clause at all. See *Will*, 449 U.S. at 227 n.31 (stating that "*O'Malley* must also be read to undermine the reasoning of *Evans*"). Now that the Federal Circuit has found new life in *Evans*, there may no longer be a consensus about the reach of that decision.

[4] The Twenty-seventh Amendment was proposed to the States by the First Congress and was first introduced in the House of Representatives by James Madison, who obviously was familiar with the Framers' understanding of the term "Compensation" as used in the Constitution. See 1 *Debates and Proceedings in the Congress of the United States* 452, 457, 756-757, 948, 950 (Joseph Gales comp. 1789).

respondents' reading of the Compensation Clause cannot be sustained.

b. Respondents also defend the decision in *Evans* by arguing (Br. in Opp. 20) that, when they were considering whether to accept a judicial commission, they compared their private-sector salaries, which were then subject to Social Security taxes, with the prospect of judicial salaries indefinitely free of such taxes. Thus, respondents argue, the subsequent extension of Social Security taxes to their judicial salaries made the judicial position relatively less attractive. That rationale, however, could not have been the basis for the Court's decision in *Evans*. The plaintiff in *Evans* became a district judge in 1899, when there was no federal income tax at all.[5] Thus, when Judge Evans took office, he could not have been comparing the relative merits of a private salary subject to federal income tax with a judicial salary free of such a tax. Moreover, respondents' argument suggests that, even if Congress could apply new taxes at one time to both private and judicial salaries, it could not first apply the tax to private salaries and later extend it to judges. The text of the Compensation Clause gives no hint that Congress is constitutionally compelled to retain permanently any exceptional relief from income taxation that it may once have granted to judges.

c. Respondents also argue (Br. in Opp. 22-24) that Congress unconstitutionally discriminated against federal judges when it extended Social Security taxes to their salaries. The court of appeals did not address that contention, and the Court of Federal Claims correctly rejected it. See Pet. App. 48a-50a.

---

[5] Judge Evans took office after this Court's decision in *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), holding the income tax unconstitutional, but before the Sixteenth Amendment was adopted in 1913. See 253 U.S. at 246.

When Congress extended Social Security taxes to judicial salaries, it merely brought taxation of those salaries in line with the treatment of the vast majority of other wage-earners in this country.[6] Respondents object (Br. in Opp. 23), however, that Congress did not also require all federal employees who were then in service to pay the old-age, survivors, and disability insurance (OASDI) portion of Social Security taxes.[7] Congress was aware, however, that most federal employees were already required to make salary contributions to a separate retirement system, the Civil Service Retirement System (CSRS), which had been in place since 1920.[8] Terminating CSRS immediately would have been extremely disruptive of federal employees' retirement plans. On the other hand, requiring federal employees to contribute to both Social Security and CSRS would have made those employees the only persons in the country subject to a mandatory double deduction imposed under federal law. Thus, to treat incumbent federal employees as equally as possible with other wage earners, Congress

---

[6] Respondents note (Br. in Opp. 22) that a very small minority of wage earners still remain outside the Social Security system. See generally 26 U.S.C. 3121(b) (1994 & Supp. III 1997) (setting forth various exceptions to coverage, including such persons as Bahamian temporary agricultural workers, student nurses, and teenagers delivering newspapers). That hardly establishes, however, that the imposition of Social Security taxes on judges' salaries is discriminatory. The taxes are surely generally applicable, even if they are not *universally* applicable—just as the income tax is not universally applicable, for not all persons have income.

[7] Respondents' discrimination argument does not apply to the Medicare hospital insurance tax, because all federal civilian employees were required to pay that tax after January 1, 1983. See Lynn Dec. ¶ 11, 94-5139 C.A. App. 109.

[8] See Act of May 22, 1920, ch. 195, 41 Stat. 614; 5 U.S.C. 719 (1925) (mandatory deduction from federal employees' salaries to finance retirement system).

allowed them to remain in CSRS.[9] Federal judges, however, were not subject to any similar mandatory civil-service retirement deduction, because judges are guaranteed a lifetime annuity, entirely at taxpayer expense, after retirement. See 28 U.S.C. 371 (1994 & Supp. III 1997). Congress therefore had no occasion to permit judges to "opt out" of Social Security.[10]

4. *Termination of Constitutional Violation.* Respondents argue (Br. in Opp. 24-28) that any Compensation Clause violation caused by the application of Social Security taxes to their salaries continues indefinitely and long after Congress raised their salaries (even net of taxes) above the level in effect before those taxes were first applied. Respondents maintain that, even after they received substantial raises in salary, they received less "compensation [than] they would have received but for the enactment of the challenged statutes" (*id.* at 28). Neither logic nor precedent supports that argument. Assume that in Year 1, judges are paid $150,000; in Year 2, Congress impermissibly reduces their stated salary to $140,000; and in Year 3, Congress

---

[9] Federal employees as of December 31, 1983, were subsequently allowed to transfer from CSRS to a different retirement system that included coverage under Social Security, see Br. in Opp. 23, but because many had long contributed to CSRS and were familiar with that system, relatively few did so.

[10] Respondents also point out (Br. in Opp. 5-7) that, when Congress extended OASDI taxes to judicial salaries, it allowed a small number of high-level federal officials and employees to opt out of CSRS, thus (respondents contend) permitting those persons effectively to offset the incidence of the new OASDI taxes on their salaries. But as we explain in the text, if Congress had required federal employees to continue contributing to both CSRS and Social Security, they would have been subject to a double deduction. Moreover, Congress did not allow those high-level officials and employees to opt out of Social Security; it required them (like judges) to pay OASDI taxes, and made the second deduction to CSRS optional. Judges were not covered by CSRS, and so they had no cause to complain of double retirement deductions.

raises it to $160,000. Although the judges would be entitled to recover the $10,000 that they should have received in Year 2, one could hardly contend that in Year 3, Congress was constitutionally required to give the judges a salary of $170,000, merely because it raised their salary by $20,000 above the previous year's level.[11] Surely any Compensation Clause violation would have come to an end once Congress raised the salaries above the pre-diminution level, for after that point, the judges' salaries would no longer be "diminished" from what they were before the violation occurred.

* * * * *

For the foregoing reasons, and for the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

AUGUST 2000

---

[11] Moreover, contrary to respondents' suggestion (Br. in Opp. 25), it would scarcely matter *why* Congress would have granted judges such a salary increase. As a matter of pure arithmetic, there would no longer be any diminution once the judges' salaries were raised above the pre-diminution level.

Supreme Court, U.S.
FILED
NOV 30 2000
OFFICE OF THE CLERK

(9)

No. 99-1978

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

SETH P. WAXMAN*
Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

W. STEPHEN SMITH*
Morrison & Foerster LLP
2000 Pennsylvania Avenue NW
Washington, D.C. 20006-1888
(202) 887-1500

STEPHEN S. ROSENTHAL
Cooper, Carvin & Rosenthal, LLC
1500 K Street NW
Washington, D.C. 20005

Counsel for Petitioner

Counsel for Respondents

**Counsel of Record*

PETITION FOR A WRIT OF CERTIORARI FILED: June 8, 2000
CERTIORARI GRANTED: Oct. 16, 2000

147 PP

TABLE OF CONTENTS

	Page
Docket entries, Unites States Claims Court	1
Docket entries, United States Court of Federal Claims	10
Docket entries, United States Court of Appeals for the Federal Circuit	15
Complaint (filed Dec. 9, 1989)	23
Transcript (partial) of Oral Argument in United States Claims Court (Nov. 9, 1990)	28
Second amended complaint (filed Dec. 11, 1992)	31
Joint stipulations, with attachments (filed July 23, 1993)	38
Declaration of Peter R. Lynn, with attachments (Aug. 27, 1993)	59
Declaration of Judge Dudley H. Bowen, Jr.	87
Declaration of Judge A.J. McNamara	95
Declaration of Judge Henry A. Mentz, Jr.	98
Declaration of Judge Michael M. Mihm	101
Memorandum to Chief Justice Burger from William E. Foley, Director, Administrative Office of the United States Courts, dated Dec. 10, 1982, filed with United States' reply in support of cross-motion for summary judgment (filed Nov. 5, 1993)	104
Administrative Office of the United States Courts, *Federal Judges and Social Security: A Report* (dated Jan. 1985), filed with United States' reply in support of cross-motion for summary judgment (filed Nov. 5, 1993)	106

Declaration of Thomas Horst (without attachments) (Nov. 11, 1996) 128

United States' reply in support of its partial motion to dismiss and cross-motion for summary judgment, Part D (pp. 22-25), and Schedules A-D (filed Feb. 20, 1997) 131

Order allowing certiorari (Oct. 16, 2000) 143

NOTICE

The following items have been omitted in printing this appendix because they appear on the following pages in the printed appendix to the petition for a writ of certiorari:

Initial decision of United States Claims Court on jurisdiction (Nov. 9, 1990) 12a

Opinion of United States Court of Appeals for the Federal Circuit, reversing United States Claims Court on jurisdiction (Jan. 16, 1992) 19a

Opinion of Court of Federal Claims on merits (June 22, 1994) 30a

Opinion of United States Court of Appeals for the Federal Circuit, reversing Court of Federal Claims on merits (Aug. 30, 1995) 54a

Order of United States Court of Appeals for the Federal Circuit, denying rehearing and rehearing en banc (Dec. 26, 1995) 67a

Order of Supreme Court affirming for lack of quorum (Oct. 7, 1996) 69a

Opinion of Court of Federal Claims on issues of limitation and damages (June 6, 1997) 70a

Opinion of United States Court of Appeals for the Federal Circuit, reversing in part Court of Federal Claims (Aug. 5, 1999) 112a

Order of United States Court of Appeals for the Federal Circuit, granting and denying petitions for rehearing and rehearing en banc and vacating panel's decision (Dec. 20, 1999) 128a

En banc opinion of United States Court of Appeals for the Federal Circuit (Feb. 9, 2000) 1a

DOCKET ENTRIES: United States Claims Court

DATE	PROCEEDINGS
Dec 29 1989	Filing fee of $120 paid by plaintiffs.
Dec 29 1989	Notice of assignment to Judge James T. Turner filed. Copy to parties.
Jan 8 1990	Defendant's notice of appearance filed. Service: 1/8/90.
Feb 22 1990	Defendant's motion for enlargement of time (to April 13, 1990) to respond to complaint filed. Service: 2/21/90. Granted: FEB. 26 1990.
Mar 19 1990	Defendant's precipe filed. Service: 3/19/90.
Apr 13 1990	Defendant's motion for more definite statement filed. Service: 4/13/90. Moot: May 3 1990.
Apr 26 1990	Plaintiffs' opposition to motion for more definite statement filed. Service: 4/26/90.
May 2 1990	Defendant's reply to opposition to motion for more definite statement filed. Service: 5/2/90 by hand.
May 15 1990	Defendant's motion to dismiss pursuant to Rule 12(b) filed. Service: 5/14/90.
May 30 1990	Defendant's motion for enlargement of time (to July 2, 1990) to respond to motion to dismiss filed.

DOCKET ENTRIES: United States Claims Court

	Service: 5/30/90 by hand. Granted: Jun 1 190.
Jul 5 1990	Plaintiff's motion for summary judgement; plaintiffs' brief in support of motion for summary judgement; and plaintiffs' proposed findings of uncontroverted fact filed by leave of the judge. Service: 7/2/90.
Jul 10 1990	Plaintiff's motion for leave to file the original signed copy of the declaration of Judge Norman C. Roettger, Jr. filed. Service: 7/10/90. Allowed: Jul 12 1990.
Jul 12 1990	Declaration of Norman C. Roettger, Jr. filed.
Jul 31 1990	Defendant's motion for enlargement of time (to August 13, 1990) to respond to motion for summary judgement and opposition to motion ot dismiss filed. Service: 7/30/90. Granted: AUG 1 1990.
Aug 13 1990	Defendant's motion for enlargement of time (to August 16, 1990) to respond to motion for summary judgement, etc. filed. Service: 8/13/90. Granted: Aug 16 1990.
Aug 20 1990	Defendant's reply to opposition to motion to dismiss; and response to motion for summary judgement filed. Service: 8/20/90.

DOCKET ENTRIES: United States Claims Court

Aug 20 1990	Defendant's Statement of genuine issues filed. Service: 8/20/90.
Aug 22 1990	Plaintiffs' motion for enlargement of time (to Sept. 17, 1990) to file its reply brief filed. Service: 8/22/90. Granted: 8/22/90.
Sept 5 1990	Defendant's notice of new legal authority filed by leave of the Judge. Service: 8/31/90.
Sept 17 1990	Plaintiffs' reply brief filed. Service: 9/17/90.
Oct 11 1990	Order entered scheduling oral argument. Copy to parties.
Nov 9 1990	Judge's opinion and order filed. Copy to parties.
Nov 13 1990	Judgement entered dismissing complaint with no costs. Copy to parties. VACATED BY ORDER ENTERED MAR 30 1992.
Nov 19 1990	Transcript of proceedings (1 volume) taken at Washington, D.C., on November 9, 1990 filed. Notice to parties.
Dec 11 1990	Transcript of proceedings (1 Volume) taken at Washington, D.C., on November 9, 1990 field. Notice to parties.
Jan 10 1991	Plaintiffs' notice of appeal filed. Copy to defendant and C.A.F.C.

	[$105 fee paid]. C.A.F.C. No. 91-5039.
Mar 6 1992	Mandate of the C.A.F.C., dated March 5, 1992, reversing decision and remanding case back to Claims Court filed. Copy to Judge.
Mar 30 1992	Order entered vacating judgement of 11/13/90. Copy to parties.
Mar 30 1992	Joint status report filed by leave of the Judge.
Jun 3 1992	Plaintiffs' motion for leave to file first amended complaint filed. Service by hand: 6/3/92. Granted: Jun 25 1992
Jun 5 1992	Plaintiffs' status report filed. Service: 6/5/92.
Jun 5 1992	Defendant's status report filed. Service: 6/5/92.
Jun 17 1992	Defendant's response to plaintiffs' motion for leave filed. Service: 6/17/92.
Jun 19 1992	Order entered scheduling status conference. Copy to parties.
Jun 25 1992	Plaintiffs' amended complaint filed.
Jun 25 1992	Plaintiffs' notice of (10) additional plaintiffs filed.
Aug 5 1992	Order entered scheduling a status conference. Copy to parties.

Sep 2 1992	Transcript of proceedings (1 volume) taken at Washington, D.C. on August 5, 1992 filed. Notice to parties.
Sep 29 1992	Order entered rescheduling the status conference. Copy to parties.
Nov 5 1992	Order entered directing the parties to file a joint status report on March 1, 1993 provided that a dispositive motion has not been filed by that date. Copy to parties.
Nov 20 1992	Transcript of proceedings (1vol.) taken at Washington, D.C. on November 5, 1992, filed. Notice to parties.
Dec 11 1992	Plaintiffs' notice of additional plaintiffs (2) filed. Service by hand: 12/11/92.
Dec 11 1992	Plaintiffs' motion for leave to file second amended complaint filed. Service: by hand 12/23/92. GRANTED BY ORDER:JAN 11 1993. COPY TO PARTIES
Dec 23 1992	Defendant's response to plaintiffs' motion for leave to file second amended complaint filed. Service: 12/23/92.
Jan 8 1993	Plaintiffs' reply to Defendant's response to motion for leave to file second amended complaint filed. Service: 1/8/93.

DOCKET ENTRIES: United States Claims Court

Jan 11 1993	Plaintiffs' second amended complaint filed.
Mar 1 1993	Defendant's notice of appearance filed. Service 3/1/93
Mar 1 1993	Plaintiffs' status report filed. Service: 3/1/92 by hand.
Mar 1 1993	Defendant's status report filed. Service: 3/1/93
Jun 1 1993	Defendant's motion for leave to file out time its answer to second amended complaint filed. Service: 6/1/93. GRANTED BY ORDER FILED JUN 2 1993. Copy to parties.
Jun 2 1993	Defendant's answer to second amended complaint filed. Service: 6/1/93.
Jun 14 1993	Defendant's notice of appearance filed. Service: 6/14/93.
Jul 26 1993	Joint motion for scheduling order filed.
Jul 26 1993	Stipulation of facts filed.
Jul 29 1993	Order entered directing plaintiffs to file their motion for summary judgement on September 1, 1993 [-10/1/93-10/15/93-10/29/93], and scheduling oral argument. Copy to parties.

DOCKET ENTRIES: United States Claims Court

Aug 29 1993	Plaintiffs' motion for substitution of plaintiff Mary M. Arceneaux for the late Bon. George Arceneaux, Jr. filed. Service: 8/30/93.
Aug 30 1993	Defendant's response to motion for substitution of Plaintiff filed. Service: 8/30/93.
Sep 1 1993	Plaintiffs' motion for leave to exceed page limitation filed. Service by hand: 9/1/93. GRANTED BY ORDER: 5/2/93. Copy to parties.
Sep 2 1993	Plaintiffs' motion for summary judgement and brief (two parts) filed by leave of the Judge.
Sep 2 1993	Plaintiffs' proposed findings of uncontroverted fact filed by leave.
Oct 1 1993	Defendant's cross-motion for summary judgement and opposition to plaintiffs' motion for summary judgement filed. Service: 10/1/93.
Oct 1 1993	Defendant's statement of genuine issues filed. Service: 10/1/93.
Oct 1 1993	Defendant's proposed findings of uncontroverted fact in support of cross-motion for summary judgement filed. Service: 10/1/93.
Oct 15 1993	Plaintiff's statement of genuine issues filed. Service: by hand 10/15/93.

Oct 27 1993	Defendant's motion for enlargement of time (to November 1, 1993) to filed its reply brief filed. Service: 10/26/93. GRANTED BY ORDER ENTERED OCT 28 1993. Copy to parties. [as]
Nov 1 1993	Defendant's motion for enlargement of time (to November 5, 1993) to respond in support of its cross-motion for summary judgement filed. Service: 11/5/93. GRANTED BY ORDER ENTERED NOV 9 1993. Copy to parties.
Nov 5 1993	Defendant's motion for leave to exceec page limit (by 18 pages) filed. Service: 11/5/93. GRANTED BY ORDER ENTERED NOV 9 1993. Copy to parties. [as]
Nov 8 1993	Defendant's motion for leave to substitute corrected copies of reply memorandum filed. Service: 11/8/93. MOOT BY ORDER ENTERED NOV 9 1993. Copy to parties. [as]
Nov 9 1993	Defendant's reply memorandum in support of its cross-motion for summary judgement filed. Service: 11/8/93. [as]
Nov 15 1993	Plaintiff's motion to supplement record filed. Service by hand: 11/12/93. [as]

Nov 15 1993	Plaintiff's motion to compel Defendant to produce certain relevant documents filed. Service by hand: 11/12/93. [as]
Nov 15 1993	Defendant's response to Plaintiff's motion to supplement record filed. Service: 11/15/93. [as]

REOPEN

UNITED STATES COURT OF FEDERAL CLAIMS
(U.S.C.F.C.)

Civil Docket No. 89-CV-705

TERRY J. HATTER, JR., JUDGE, GEORGE ARCENEAUX, JR., JUDGE, PETER H. BEER, JUDGE, DUDLEY H. BOWEN, JR., JUDGE, A. J. MCNAMARA, JUDGE, HARRY PREGERSON, JUDGE, RAUL A. RAMIREZ, JUDGE, NORMAN C. ROETTGER, JR., JUDGE, THOMAS A. WISEMAN, JR., CHIEF JUDGE, DELORES LEE BURCIAGA, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/29/89	1	COMPLAINT FILED. FILING FEE $ 120 Answer due on 2/27/90 (mm) [Entry date 11/22/93]
		* * * * *
6/25/92	3	NOTICE of (10) additional plaintiffs filed by ALL PLAINTIFFS. Service: 6/25/92 (mm) [Entry date 11/22/93]
12/11/92	4	NOTICE of (2) additional plaintiffs filed by ALL PLAINTIFFS

DATE	DOCKET NUMBER	PROCEEDINGS
		Service: 12/11/92 (mm) [Entry date 11/22/93]
6/22/94	20	PUBLISHED DECISION entered denying plaintiff's motion for summary judgment, granting defendant's cross-motion for summary judgment, and directing entry of judgment in favor of defendant (signed by Judge James T. Turner). Copy to parties. (tw) [Entry date 06/24/94]
6/24/94	21	JUDGMENT entered pursuant to Rule 58 dismissing the complaint. Each party shall bear its own costs (signed by Clerk). Copy to parties. (tw) [Entry date 06/27/94]
6/24/94	—	Case closed. (tw) [Entry date 06/27/94]
7/18/94	22	NOTICE OF APPEAL by ALL PLAINTIFFS. Copy to defendant, Judge and to C.A.F.C. FILING FEE $ 105.00, RECEIPT # 037187. (hw) [Entry date 07/20/94]
7/26/94	—	CAFC Case Number Re: [22-1] appeal by ALL PLAINTIFFS CAFC NUMBER: 94-5139. (hw)
1/3/96	23	MANDATE (certified copy) from CAFC dated January 2, 1996,

DATE	DOCKET NUMBER	PROCEEDINGS
		reversing the [21-1] judgment order. (hw) [Entry date 02/15/96]
5/6/96	37	ORDER Staying all proceedings until all matters pertaining proceedings in the Supreme Court are finally resolved (signed by Judge James T. Turner). Copy to parties. (hw) [Entry date 05/10/96]
		* * * * *
10/11/96	38	ORDER lifting 5/6/96 Stay of proceedings, and directing plaintiffs' to file any motion for summary judgment by 11/15/96, (if motion is desired) with defendant's response and plaintiff's reply, if any, shall be filed within the times permitted by RCFC 83.2(c). (signed by Judge James T. Turner) Copy to parties. (hw) [Entry date 10/15/96]
		* * * * *
11/12/96	40	MOTION by ALL PLAINTIFFS (Service BY HAND: 11/12/96 Summary Judgment. Response due: 12/10/96 (as) [Entry date 11/15/96]
		* * * * *
12/18/96	43	CROSS MOTION by USA (Service: 12/16/96) and RESPONSE to [40-1] motion for Summary Judgment by ALL PLAINTIFFS by leave of the Judge. Response due: 1/16/97. (as) [Entry date 12/23/96]

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
1/16/97	46	RESPONSE by ALL PLAINTIFFS (Service: 1/16/97) to [43-1] cross motion. Reply due: 2/3/97 (as) [Entry date 01/22/97]
		* * * * *
2/25/97	53	REPLY by USA to response to [43-1] cross motion. Service 2/20/97 (as) [Entry date 03/04/97]
		* * * * *
6/6/97	56	PUBLISHED DECISION (signed by Judge James T. Turner). Copy to parties. (ds) [Entry date 06/09/97]
		* * * * *
6/11/97	57	JUDGMENT entered pursuant to Rule 58 in accordance with section IX (pp. 31-32 of the court's opinion and order filed June 6, 1997. (See file) (signed by Clerk). Copy to parties. (tw) [Entry date 06/12/97]
		* * * * *
6/11/97	--	Case closed (tw) [Entry date 06/12/97]
		* * * * *
6/12/97	58	NOTICE OF APPEAL by ALL PLAINTIFFS. Copy to USA, Judge Turner and to CAFC. FILING FEE $ 105.00; RECEIPT # 043704. (hw) [Entry date 06/16/97]

DATE	DOCKET NUMBER	PROCEEDINGS
6/13/97	59	CERTIFIED TRANSCRIPT OF JUDGMENT forwarded to attorney of record. See letter in file. (tw) [Entry date 07/22/97]
6/23/97	--	CAFC Case Number Re: [58-1] appeal by ALL PLAINTIFFS. CAFC NUMBER: 97-5093. (hw) [Entry date 07/08/97]
8/8/97	60	NOTICE OF CROSS-APPEAL by USA. Copies to Judge Terry J. Hatter, Jr., et al., Judge Turner and CAFC. Fee not required. (hw) [Entry date 08/12/97]
8/14/97		CAFC Case Number Re: [60-1] appeal by USA CAFC NUMBER: 97-5123 (hw) [Entry date 08/19/97]
10/27/97	61	MANDATE (certified copy) from CAFC dated 10/27/97 dismissed [60-1] appeal by USA. (hw) [Entry date 11/19/97]
		* * * * *
4/20/00	64	MANDATE-(certified copy) from CAFC dated April 20, 2000 reversing the k [57-1] judgment order. (hw) [Entry date 04/21/00]

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

TERRY J. HATTER, JR., JUDGE, ET AL., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

DOCKET ENTRIES

DATE	PROCEEDINGS AND ORDERS
January 10, 1991	Notice of appeal filed by Plaintiffs in the US Clms court. (1p)
January 11, 1991	Notice of appeal and certified list, received. (1p) COUNSEL FOR THE APPELLANT: Steven S. Rosenthal (tth) MOB ___ BAS ____ _____ COUNSEL FOR THE APPELLEE: Terrence S. Hartman MOB ___ BAS ____ _____
September 13, 1991	ARGUED. (Archer, Plager and Rader, JJ) (tth)
January 16, 1992	REVERSED AND REMANDED. (Rader, J) "JUDGMENT ENTERED" (jb) F2nd 953-626
July 18, 1994	Notice of appeal filed by Plantiffs in the US Ct. of Fed. Claims.
July 20, 1994	Notice of appeal and certified list, received. (cs)

March 8, 1995	Submitted after ORAL ARGUMENT by Steven S. Rosenthal and Jeanne E. Davidson
94-5139 (PAM)	(ARCHER, PLAGER AND RADER)
August 30, 1995	REVERSED AND REMANDED. (Rader, J) "JUDGEMENT ENTERED" EACH PARTY SHALL BEAR ITS OWN COSTS. (Pjt) 64 F3D 647
	14. Appellee - MOTION FOR A 30-DAY EXTENSION OF TIME, TO AND INCLUDING NOVEMBER B.A.V., 1995, WITHIN WHICH TO FILE A PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC. (MS-10/06/95) FILED: 10/06/95. ON CONSENT. ACTION ON MOTION (15): GRANTED. BY CLERK. FILED: 10/10/95. (EOD 10/18/95 BY JB) 94-5139
	APPELLEE- COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC (MS-11/13/95) FILED: 11/13/95 PETITION CIRCULATED: 11/14/95 SUGGESTION CIRCULATED: 11/27/95 RESPONSE REQUESTED FROM: APPELLANT (HATTER, ET AL.) RESPONSE DUE: 12/12/95 RESPONSE FILED: 12/12/95 RESPONSE CIRCULATED: 12/13/95 PETITION/SUGGESTION: DENIED/DECLINED ON 12/26/95. (EOD 12/26/95 BY AV) 94-5139
January 2, 1996	ISSUED AS A MANDATE TO THE US COURT OF FEDERAL CLAIMS. (1p)
	16. PETITION FOR WRIT OF CER-

DATE	PROCEEDINGS AND ORDERS
	TIORARI FILED 04/24/96, SUPREME COURT #: 95-1733. CERT. DENIED ON 10/07/96. U.S.L.W.: 64-3741 (EOD 10/08/96 BY CS) 94-5139

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Civil Docket No. 89-CV-705
CHIEF JUDGE MICHAEL M. MIHM; CHIEF JUDGE TERENCE T, EVANS; CHIEF JUDGE THOMAS A. WISEMAN, JR.; CHIEF JUDGE WILBUR D. OWENS, JR.; DOLORES LEE BURCIAGA, EXECUTRIX OF THE ESTATE OF CHIEF JUDGE JUAN G. BURCIAGA, DECEASED; JUDGE A.J. MCNAMARA; JUDGE DUDLEY H. BOWEN, JR.; JUDGE HAROLD A. BAKER; JUDGE HARRY PREGERSON; JUDGE HENRY A. MENTZ, JR.; JUDGE HENRY R. WILHOIT, JR.; JUDGE NORMAN C. ROETTGER, JR.; JUDGE PETER H. BEER; JUDGE RAUL A. RAMIREZ; JUDGE TERRY J. HATTER, JR.; MARY MARTIN ARCENEAUX, ON BEHALF OF THE LATE JUDGE GEORGE ARCENEAUX, JR.; PLAINTIFFS-APPELLANTS

v.

UNITED STATES, DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS AND ORDERS
April 9, 1998	Submitted after ORAL ARGUMENT by Steven S. Rosenthal and Jeanne E. Davidson.
97-5093 (KSH)	(PLAGER, ARCHER and RADER)
	REVERSED AND REMANDED. PRECEDENTIAL OPINION BY: J. PLAGER. JUDGEMENT ENTERED: 08/05/99. COSTS AGAINST APPELLEE. (EOD 08/05/99 BY KSH) 97-5093
	(Opinion withdrawn with respect to part 3-(Order 12/20/99))

DATE	PROCEEDINGS AND ORDERS
	APPELLEE - COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC [NPF] (MS-09/20/99) FILED: 09/20/99 PETITION CIRCULATED: 09/22/99 SUGGESTION CIRCULATED: 10/05/99 RESPONSE REQUESTED FROM: APPELLANT (JUDGE TERRY J. HATTER, ET AL.) RESPONSE DUE: 10/20/99 RESPONSE FILED: 10/20/99 RESPONSE CIRCULATED: 10/21/99 PETITION/ SUGGESTION: DENIED/ DECLINED ON 11/04/99. (EOD 11/04/99 BY GYK) 97-5093
	Order issued in error and vacated on 11/5/99.
	APPELLANTS - COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC [NPF] (HS-09/20/99) FILED: 09/20/99 PETITION CIRCULATED: 09/22/99 SUGGESTION CIRCULATED: 10/05/99 RESPONSE REQUESTED FROM: APPELLEE (U.S.) RESPONSE DUE: 10/20/99 RESPONSE FILED: 10/20/99 RESPONSE CIRCULATED: 10/21/99 PETITION/SUGGESTION: DENIED/DECLINED ON 11/04/99. (EOD 11/04/99 BY GYK) 97-5093

DATE	PROCEEDINGS AND ORDERS
	Order issued in error and vacated on 11/5/99.
	APPELLANTS - COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC [NPF] (HS-09/20/99) FILED: 09/20/99 PETITION CIRCULATED: 09/22/99 SUGGESTION CIRCULATED: 10/05/99: RESPONSE REQUESTED FROM: APPELLEE (U.S.) RESPONSE DUE: 10/20/99 RESPONSE FILED: 10/20/99 RESPONSE CIRCULATED: 10/21/99 PETITION/SUGGESTION: DENIED/GRANTED ON 12/20/99. (EOD 12/20/99 BY AV) 97-5093
	APPELLEE - COMBINED PETITION FOR REHEARING AND SUGGESTION FOR REHEARING IN BANC [NPF] (MS-09/20/99) FILED: 09/20/99 PETITION CIRCULATED: 09/22/99 SUGGESTION CIRCULATED: 10/05/99 RESPONSE REQUESTED FROM: APPELLANT (JUDGE TERRY J. HATTER, ET AL.) RESPONSE DUE: 10/20/99 RESPONSE FILED: 10/20/99 RESPONSE CIRCULATED: 10/21/99 PETITION/SUGGESTION: DENIED/DENIED ON 12/20/99. (EOD 12/20/99 BY AV) 97-5093
	16. ORDERED: THE CT. ORDERS

	ISSUED ON 11/4/99 DENYING THE APPELLANTS' & APPELLEE'S REHEARING REQUESTS WERE ISSUED IN ERROR, & ARE VACATED. ALL REHR.ING REQUESTS ARE STILL PENDING. BY: CLERK. (CS-11/05/99) FILED: 11/05/99 (EOD 11/05/99) (AV) 97-5093
	17. ORDERED: THE JUDGMENT OF THE CT. ENTERED ON 8/5/99 IS VACATED & THE OPINION OF THE CT. ACCOMPANYING THE JUDGMENT IS WITHDRAWN W/RESPECT TO PART 3. ADDITIONAL BRIEFING & ARGUMENT ARE NOT INDICATED AT THIS TIME. BY: COURT-EN BANC. (CS-12/20/99) FILED: 12/20/99 (EOD 12/20/99) (AV) 97-5093
	18. ORDERED: THE JUDGMENT OF THE COURT ENTERED ON 8/5/99 IS REINSTATED (THE OPINION REMAINS IN EFFECT AS TO PARTS 1 & 2). THE OPINION OF THE COURT EN BANC ISSUED TODAY SUPERCEDES PART 3 OF THAT OPINION. BY: CLERK. (PRECEDENTIAL ORDER) (CS-02/09/00) FILED: 02/09/00 (EOD 02/10/00) (AV) 97-5093
	REVERSED AND REMANDED. PRECEDENTIAL OPINION BY: J. PLAGER. JUDGMENT ENTERED: 02/09/00. COSTS AGAINST APPELLEE. (EOD 02/09/00 BY AVV) 97-5093

PETITION FOR WRIT OF CERTIORARI FILED 06/08/00. SUPREME COURT #: 99-1978. (EOD 07/13/00 BY BG) 97-5093

PETITION FOR WRIT OF CERTIORARI FILED 06/08/00. SUPREME COURT #: 99-1978. CERT. GRANTED ON 10/16/00. (EOD 10/17/00 BY BG) 97-5093

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, JR., JUDGE GEORGE ARCENEAUX, JUDGE PETER H. BEER; JR., JUDGE DUDLEY H. BOWEN, JR., JUDGE JUAN G. BURCIAGA, JUDGE A.J. MCNAMARA; JUDGE HARRY PREGERSON, JUDGE RAUL A. RAMIREZ, JUDGE NORMAN C. ROETTGER, JR., CHIEF JUDGE THOMAS A. WISEMAN, JR., PLAINTIFFS,

v.

THE UNITED STATES OF AMERICA, DEFENDANT.

COMPLAINT

Plaintiffs (1) Judge Terry J. Hatter, Jr., (2) Judge George Arceneaux, Jr., (3) Judge Peter H. Beer, (4) Judge Dudley H. Bowen, Jr., (5) Judge Juan G. Burciaga, (6) Judge A.J. McNamara, (7) Judge Harry Pregerson, (8) Judge Raul A. Ramirez, (9) Judge Norman C. Roettger, Jr., and (10) Chief Judge Thomas A. Wiseman, Jr. complain against The United States of America and allege as follows:

Nature of the Case

1. This is an action for damages pursuant to Article III, Section 1, of the Constitution of the United States and pursuant to plaintiffs' contracts of employment. This claim arises because the United States has diminished the compensation of Article III judges appointed prior to January 1, 1984 by reason of the Social Security Amendments of 1983, Public Law 98-21, and related statutes.

Jurisdiction

2. This Court has jurisdiction over this action pursuant to 28 U.S.C § 1491(a)(1). The individual claim of each plaintiff exceeds ten thousand dollars ($10,000).

Parties

3. Plaintiff (1) Terry J. Hatter, Jr. serves as a judge of the United States District Court for the Central District of California and was appointed on December 20, 1979.

4. Plaintiff (2) George Arceneaux, Jr. serves as a Judge of the United States District Court for the Eastern District of Louisiana and was appointed on September 26, 1979.

5. Plaintiff (3) Peter H. Beer serves as a Judge of the United States District Court for the Eastern District of Louisiana and was appointed on November 27, 1979.

6. Plaintiff (4) Dudley H. Bowen, Jr. serves as Judge of the United States District Court for the Southern District of Georgia and was appointed on November 27, 1979.

7. Plaintiff (5) Juan G. Burciaga serves as Judge of the United States District Court for the District of New Mexico and was appointed on November 2, 1979.

8. Plaintiff (6) A.J. McNamara serves as a Judge of the United States District Court for the Eastern District of Louisiana and was appointed on June 21, 1982.

9. Plaintiff (7) Harry Pregerson serves as a Judge of the United States Court of Appeals for the Ninth Circuit and was appointed on November 2, 1979.

10. Plaintiff (8) Raul A. Ramirez serves as a Judge of the United States District Court for the Eastern District of California and was appointed on May 23, 1980.

11. Plaintiff (9) Norman C. Roettger, Jr. serves as a Judge of the United States District Court for the Southern District of Florida and was appointed on June 2, 1972.

12. Plaintiff (10) Thomas A. Wiseman, Jr. serves as Chief Judge of the United States District Court for the Middle District of Tennessee and was appointed on August 11, 1978.

13. The Defendant is the United States of America, which is responsible for assuring that plaintiffs' compensation is not diminished "during their Continuance in Office."

Background

14. Each of the plaintiffs is an Article III judge appointed to his present office by the President of the United States with the advice and consent of the United States Senate pursuant to Article II, Section 2, of the Constitution of the United States. Each of the plaintiffs was appointed prior to April 20, 1983 and has served continuously as a federal judge from date of appointment to the present date.

15. At the time each plaintiff was appointed an Article III judge, the terms and conditions of employment, as determined by statute, permitted an Article III judge to retire after meeting certain age and service requirements and to receive an annuity for the remainder of his lifetime equal to his salary at the time of retirement. An Article III judge may alternatively retire from active service, thereby retaining his office and the salary of the office, including any increases thereof.

16. The Social Security Amendments of 1983, Public Law 98-21, extended Social Security coverage to many previously uncovered civilian employees of the federal government. By defining Article III judges as "employees" under the Social Security Act, this statute required for the first time that social security deductions be made from wages received by Article III judges, which constitute a part of their compensation. 42 U.S.C. § 410(a)(5)(E). Either as a result of these deductions, or as a result of defendant's failure to increase plaintiffs' salaries by the amount of these deductions, defendant has diminished plaintiffs' compensation.

17. Subsequent statutes, such as the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Public Law 98-168, and the Federal Employees' Retirement System Act of 1986, Public Law 99-335, gave federal employees other than Article III judges certain elections regarding retirement salary deductions and retirement systems. Article III judges, however, received no relief under these statutes. For example, Article III judges were not given the right granted other federal employees to opt out of the Social Security system.

Count I: Constitution Violation

18. Paragraphs 1-17 are incorporated herein.

19. Article III, Section 1, of the Constitution of the United States provides in pertinent part that Article III judges "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

20. The defendant, by virtue of Public Law 98-21, unlawfully diminished and continues to diminish plaintiffs' compensation in violation of Article III, Section 1, of the Constitution of the United States from January 1, 1984 to the present time. This diminution was discriminatory. Each plaintiff is, therefore, entitled to damages in the amount by which his compensation has been diminished.

Count II: Breach of Contract

21. Paragraphs 1-17 are incorporated herein.

22. Article III, Section 1, of the Constitution of the United States and the statutes in effect at the time plaintiffs assumed their offices constitute a contract of employment between plaintiffs and defendant, under which defendant agrees not to

diminish plaintiffs' compensation "during their Continuance in Office."

23. The defendant, by virtue of Public Law 98-21, breached its contract with plaintiffs by unlawfully diminishing and continuing to diminish plaintiffs' compensation from January 1, 1984 to the present time. Each plaintiff is, therefore, entitled to damages in the amount by which their compensation has been diminished.

Prayer for Relief

WHEREFORE, plaintiffs respectfully request that judgment be entered:

A. Awarding each plaintiff damages in the amount by which their compensation has been diminished from January 1, 1984 to the date of judgment.

B. Awarding plaintiffs such further relief as this Court deems just and appropriate.

Respectfully submitted,

Steven S . Rosenthal

MORRISON & FOERSTER
2000 Pennsylvania Avenue, N.W.
Suite 5500
Washington, D.C. 20006
(202) 887-1500

Attorneys for Plaintiffs

Dated: December 29, 1989

UNITED STATES CLAIMS COURT

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

THE UNITED STATES, Defendant.

TRANSCRIPT OF PROCEEDINGS
NOVEMBER 9, 1990

[p. 38, line 14] THE COURT: I think you have certainly addressed it. Let me ask you about one other aspect. My recollection is that at the same time that the Social Security tax became applicable to judges on January, 1984, a COLA also went into effect, which was more than off-setting, that is, that if Social Security taxes took out more than $3,000, then the COLA increased their annual salaries by somewhat more than that.

MR. ROSENTHAL: Actually, the COLA didn't go into effect simultaneously.

THE COURT: One month later?

MR. ROSENTHAL: My recollection is that it didn't [39] go into effect until nine-months later and it was retroactive. That issue is dealt with expressly by the Supreme Court in *Booth v. The United States*, that you can't somehow compensate for diminution in the past on the basis of some increase in salary in the future.

THE COURT: You say that's the holding in *Booth*? How did Congress ever—let's say that Congress took your position and said that we have violated the Constitution, we have unlawfully diminished these salaries. Let us give them a raise that will off-set that. Are you saying they can do that?

MR. ROSENTHAL: If it had expressly given a raise for the purpose of compensation, I think if the intent was to

expressly increase the salaries of the federal judges for this diminution.

THE COURT: You could see where I was coming from. The fact that the judges are making $3,000 more a year than they were in 1984, that doesn't do the government any good. There is still a diminution every month and the judge is entitled to it?

MR. ROSENTHAL: That's right. As a factual matter, we don't have a simultaneous increase. We do have a subsequent increase that takes place. I am not saying our claim couldn't be compensated for by the payment of whatever was due for the past periods, but a general increase in the [40] salaries does not undo the claim itself.

THE COURT: Why is that? The claim was diminished, let's say I'll concede, and then later there was an increase to bring the judge back up to where he was.

MR. ROSENTHAL: Because the general increase was just that, a general increase. It was not intended to compensate for the particular diminution that took place in this case.

The fact of the matter is that these judges continue to be 5, 10, 15 percent behind where they would have been. Even today, if you take a snapshot today, whatever the judges are earning, let's say it's $100,000, is subject to a $10,000 deduction for the Social Security claim. What you would have is a rolling problem which would go on ad infinitum with respect to these claims. I don't think that the Supreme Court has ever held—my recollection of *Booth* and I am going to have to look at it again, is that argument was made by the judges in *Booth* and the Supreme Court—I am virtually confident that the Supreme Court directed that a subsequent increase in salary doesn't answer the problem of a diminution in the past.

THE COURT: I understand your position that this 1984 Social Security tax [is not]* exactly simultaneous with the

*The parties agree that these words were inadvertently omitted from the transcript.

raise. Suppose it had been? Suppose Congress put the judges under a Social Security tax and then, without saying [41] what it was for, gave them a raise or say they were giving to the old judges and it would apply subsequently, and it happened to be the same amount that the tax was going to take, is that salary being diminished in violation of the Constitution?

MR. ROSENTHAL: I think there would have to be some indicia, that the intent was to compensate for this particular deduction. If what they did was they increased—in point of fact, we don't have that case here. The Congress did not—interestingly enough, as it turns out, it occurred exactly the opposite. Congress did [not]* compensate on the facts of this case.

*The parties agree that these words were inadvertently omitted from the transcript.

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

THE UNITED STATES, Defendant.

SECOND AMENDED COMPLAINT

Plaintiffs (1) Judge Terry J. Hatter, Jr., (2) Judge George Arceneaux, Jr., (3) Judge Peter H. Beer, (4) Judge Dudley H. Bowen, Jr., (5) Chief Judge Juan G. Burciaga, (6) Judge A.J. McNamara, (7) Judge Harry Pregerson, (8) Judge Raul A. Ramirez, (9) Judge Norman C. Roettger, Jr., (10) Chief Judge Thomas A. Wiseman, Jr., (11) Chief Judge Terence T. Evans, (12) Judge Henry A. Mentz, Jr., (13) Chief Judge Wilbur D. Owens, Jr., (14) Judge Henry R. Wilhoit, Jr., (15) Chief Judge Harold A. Baker, and, (16) Judge Michael M. Mihm complain against The United States of America and allege as follows:

Nature of the Case

1. This is an action for damages pursuant to Article III, Section 1, of the Constitution of the United States and pursuant to plaintiffs' contracts of employment. This claim arises because the United States has diminished the compensation of Article III judges appointed prior to January 1, 1983 by reason of the Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97-248, and the Social Security Amendments of 1983, Public Law 98-21, and related statutes.

Jurisdiction

2. This Court has jurisdiction over Counts I and III of this action pursuant to 28 U.S.C § 1491(a)(1). See *Hatter v. United*

States, 953 F.2d 626 (Fed. Cir. 1992). The individual claim of each plaintiff exceeds ten thousand dollars ($10,000).

3. This Court has jurisdiction over Count II of this action pursuant to 28 U.S.C. § 1346(a)(1).

Parties

4. Plaintiff (1) Terry J. Hatter, Jr. serves as Judge of the United States District Court for the Central District of California and was appointed on December 20, 1979.

5. Plaintiff (2) George Arceneaux, Jr. serves as Judge of the United States District Court for the Eastern District of Louisiana and was appointed on September 26, 1979.

6. Plaintiff (3) Peter H. Beer serves as Judge of the United States District Court for the Eastern District of Louisiana and was appointed on November 27, 1979.

7. Plaintiff (4) Dudley H. Bowen, Jr. serves as Judge of the United States District Court for the Southern District of Georgia and was appointed on November 27, 1979.

8. Plaintiff (5) Juan G. Burciaga serves as Chief Judge of the United States District Court for the District of New Mexico and was appointed on November 2, 1979.

9. Plaintiff (6) A.J. McNamara serves as Judge of the United States District Court for the Eastern District of Louisiana and was appointed on June 21, 1982.

10. Plaintiff (7) Harry Pregerson serves as Judge of the United States Court of Appeals for the Ninth Circuit and was appointed on November 2, 1979.

11. Plaintiff (8) Raul A. Ramirez served as Judge of the United States District Court for the Eastern District of California from his appointment on May 23, 1980 until December 31, 1989.

12. Plaintiff (9) Norman C. Roettger, Jr. serves as Judge of the United States District Court for the Southern District

of Florida and was appointed on June 2, 1972.

13. Plaintiff (10) Thomas A. Wiseman, Jr. serves as Chief Judge of the United States District Court for the Middle District of Tennessee and was appointed on August 11, 1978.

14. Plaintiff (11) Terence T. Evans serves as Chief Judge of the United States District Court for the Eastern District of Wisconsin and was appointed on November 2, 1979.

15. Plaintiff (12) Henry A. Mentz, Jr. serves as Judge of the United States District Court for the Eastern District of Louisiana and was appointed on June 25, 1982.

16. Plaintiff (13) Wilbur D. Owens, Jr. serves as Chief Judge of the United States District Court for the Middle District of Georgia, and was appointed on March 1, 1972.

17. Plaintiff (14) Henry R. Wilhoit, Jr. serves as Judge of the United States District Court for the Eastern District of Kentucky and was appointed on October 23, 1981.

18. Plaintiff (15) Harold A. Baker serves as Chief Judge of the United States District Court for the Central District of Illinois and was appointed on September 23, 1978.

19. Plaintiff (16) Michael M. Mihm serves as Judge of the United States District Court for the Central District of Illinois and was appointed on August 5, 1982.

20. The Defendant is the United States of America, which is responsible for assuring that plaintiffs' compensation is not diminished "during their Continuance in Office."

Background

21. Each of the plaintiffs is or was an Article III judge appointed to his office by the President of the United States with the advice and consent of the United States Senate pursuant to Article II, Section 2, of the Constitution of the

United States. Each of the plaintiffs was appointed prior to August 19, 1982 and has served continuously as a federal judge from date of appointment to the present date with the exception of plaintiff (8), Raul A. Ramirez, who served continuously until his resignation from the federal bench on December 31, 1989.

22. At the time each plaintiff was appointed an Article III judge, the terms and conditions of employment, as determined by statute, permitted an Article III judge to retire after meeting certain age and service requirements and to receive an annuity for the remainder of his lifetime equal to his salary at the time of retirement. An Article III judge may alternatively retire from active service, thereby retaining his office and the salary of the office, including any increases thereof.

23. The Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97-248, and the Social Security Amendments of 1983, Public Law 98-21, extended Social Security coverage to many previously uncovered civilian employees of the federal government. By defining Article III judges as "employees" under the Social Security Act, these statutes required for the first time that hospital insurance and old age survivors and disability insurance deductions be made from wages received by Article III judges, which constitute a part of their compensation. 42 U.S.C. § 410(a)(5)(E). Either as a result of these deductions, or as a result of defendant's failure to increase plaintiffs' salaries by the amount of these deductions, defendant has diminished plaintiffs' compensation.

24. Subsequent statutes, such as the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Public Law 98-168, and the Federal Employees' Retirement System Act of 1986, Public Law 99-335, gave federal employees other than Article III judges certain elections regarding retirement salary deductions and retirement systems. Article III judges, however, received no relief under these statutes. For example, Article III judges were not given the

right granted other federal employees to opt out of the Social Security system.

Count I: Damages for Constitutional Violation

25. Paragraphs 1-24 are incorporated herein.

26. Article 111, Section 1, of the Constitution of the United States provides in pertinent part that Article III judges "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

27. The defendant, by virtue of Public Law 97-248 and Public Law 98-21, unlawfully diminished and continues to diminish plaintiffs' compensation in violation of Article III, Section 1, of the Constitution of the United States from January 1, 1983 to the present time. This diminution was discriminatory. Each plaintiff is, therefore, entitled to damages in the amount by which his compensation has been diminished.

Count II: Tax Refund for Constitutional Violation

28. Paragraphs 1-24 are incorporated herein.

29. Article III, Section 1, of the Constitution of the United States provides in pertinent part that Article III judges "shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office."

30. The defendant, by virtue of Public Law 97-248 and Public Law 98-21, has imposed taxes upon plaintiffs' compensation in violation of Article III, Section 1, of the Constitution of the United States from January 1, 1983 to the present time. This imposition of taxes upon plaintiffs' compensation was discriminatory. Plaintiffs (1)-(13), therefore, seek refund of taxes unconstitutionally imposed, plus interest.

31. Plaintiffs (1)-(13) have exhausted their administrative remedies pursuant to 26 U.S.C. § 7422(a) and have satisfied the requirements of 26 U.S.C. § 6532(a)(1). Official notices of the Internal Revenue Service's denial of their Claims for Refund or evidence that more than six months have passed since their Claims for Refund were filed are attached to the First Amended Complaint as Exhibits 1-13.

Count III: Breach of Contract

32. Paragraphs 1-24 are incorporated herein.

33. Article III, Section 1, of the Constitution of the United States and the statutes in effect at the time plaintiffs assumed their offices constitute a contract of employment between plaintiffs and defendant, under which defendant agrees not to diminish plaintiffs' compensation "during their Continuance in Office."

34. The defendant, by virtue of Public Law 97-248 and Public Law 98-21, breached its contract with plaintiffs by unlawfully diminishing and continuing to diminish plaintiffs' compensation from January 1, 1983 to the present time. Each plaintiff is, therefore, entitled to damages in the amount by which their compensation has been diminished.

Prayer for Relief

WHEREFORE, plaintiffs respectfully request that judgment be entered:

A. Awarding each plaintiff damages in the amount by which their compensation has been diminished.

B. Alternatively, awarding plaintiffs (1)-(13) a tax refund for the amount of tax unlawfully deducted from each plaintiff's compensation in the years for which each plaintiff has filed Claims for Refund with the Internal Revenue Service.

C. Awarding plaintiffs such further relief as this Court deems just and appropriate.

Of Counsel

W. Stephen Smith
Ellen E. Deason
MORRISON & FOERSTER
2000 Pennsylvania Avenue,
N.W., Suite 5500
Washington, D.C. 20006
(202) 887-1500

Respectful submitted,

Steven S. Rosenthal
MORRISON & FOERSTER
2000 Pennsylvania Avenue,
N.W., Suite 5500
Washington, D.C. 20006
(202) 887-1500

Attorney for Plaintiffs

Dated: December 11, 1992

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

THE UNITED STATES, Defendant.

JOINT STIPULATIONS

The parties to the above-captioned case stipulate jointly as follows:

1. For purposes of this case:

a. the "Tax Equity Act" refers to the Tax Equity and Fiscal Responsibility Act of 1982, Public Law 97-248, September 3, 1982.

b. the "Social Security Amendments of 1983" refers to Public Law 98-21, April 20, 1983;

c. the "Temporary Adjustment Act" refers to the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Public Law 98-168, November 29, 1983;

d. the "Deficit Reduction Act of 1984" refers to Public Law 98-369, July 18, 1984;

e. "FERS" refers to the Federal Employees' Retirement System;

f. the "FERS Act," refers to the Federal Employees' Retirement System Act, Public Law 99-335, June 6, 1986;

g. "FICA" refers to the Federal Insurance Contributions Act;

h. "CSRS" refers to the Civil Service Retirement System;

i. "HI" refers to Hospital Insurance;

j. "JSAS" refers to the Judicial Survivor's Annuity System;

k. "OASDI" refers to Old Age Survivors' Disability Insurance;

l. the "interim offset plan" refers to the withholding procedures established by § 204 of the Temporary Adjustment Act, 5 U.S.C. § 8331 note;

m. "CSRS Offset" refers to the withholding procedures codified at 5 U.S.C. §§ 8334, 8349.

2. Terry J. Hatter, Jr. was appointed as an Article III judge on December 20, 1979. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the Central District of California.

3. George Arceneaux, Jr. was appointed as an Article III judge on September 26, 1979. He served continuously from at least January 1, 1984 until April 6, 1993 as a United States District Judge for the Eastern District of Louisiana.

4. Peter H. Beer was appointed as an Article III judge on November 27, 1979. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the Eastern District of Louisiana.

5. Dudley H. Bowen, Jr. was appointed as an Article III judge on November 27, 1979. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the Southern District of Georgia.

6. Juan G. Burciaga was appointed as an Article III judge on November 2, 1979. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the District of New Mexico.

7. A.J. McNamara was appointed as an Article III judge on June 21, 1982. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the Eastern District of Louisiana.

8. Harry Pregerson was appointed as an Article III judge on December 7, 1967. He has served continuously from at least January 1, 1984 until the present as Circuit Judge on the United States Court of Appeals for the Ninth Circuit.

9. Raul A. Ramirez was appointed as an Article III judge on May 23, 1980. He served continuously from at least January 1, 1984 through December 31, 1989 as a United States District Judge for the Eastern District of California.

10. Norman C. Roettger, Jr. was appointed as an Article III judge on June 2, 1972. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the Southern District of Florida.

11. Thomas A. Wiseman, Jr. was appointed as an Article III judge on August 11, 1978. He has served continuously from at least January 1, 1984 until the present as a United States District Judge for the Middle District of Tennessee.

12. Terence T. Evans was appointed as an Article III judge on November 2, 1979. He has served continuously from at least June 3, 1986 to the present as a United States District Judge for the Eastern District of Wisconsin.

13. Henry A. Mentz, Jr. was appointed as an Article III judge on June 25, 1982. He has served continuously from at least June 3, 1986 until the present as a United States District Judge for the Eastern District of Louisiana.

14. Wilbur D. Owens, Jr. was appointed as an Article III judge on March 1, 1972. He has served continuously

from at least June 3, 1986 until the present as United States District Judge for the Middle District of Georgia.

15. Henry R. Wilhoit, Jr. was appointed as an Article III judge on October 23, 1981. He has served continuously from at least June 3, 1986 to the present as United States District Judge for the Eastern District of Kentucky.

16. Harold A. Baker was appointed as an Article III judge on September 23, 1978. He has served continuously from at least January 1, 1987 to the present as United States District Judge for the Central District of Illinois.

17. Michael M. Mihm was appointed as an Article III judge on August 5, 1982. He has served continuously from at least January 1, 1987 to the present as United States District Judge for the Central District of Illinois.

18. Social Security Administration data indicates that, as of December 1983, 82.9% of the total labor force (excluding the Armed Forces) and 90.7% of the paid civilian population were covered by Social Security. Social Security Administration data indicates that, as of December 1984, 85.9% of the total labor force (excluding the Armed Forces) and 92.9% of the paid civilian population were covered by Social Security.

19. The Office of Personnel Management (OPM) estimates that as of September 1983, 207,155 civilian federal employees were subject to Social Security, while 2,503,914 civilian federal employees were not subject to Social Security.

20. OPM estimates that as of September 1983 there were 2,690,000 federal employees employed in position categories that the Social Security Amendments of 1983 made subject to Social Security on January 1, 1984 for employees hired for those positions subsequent to December 31, 1983, excluding those persons who returned to federal employment after a separation of

less than 365 days and who had not been subject to Social Security in their earlier government position.

21. According to the Administrative Office of the United States Courts: (1) 644 Article III judges became subject to Social Security on January 1, 1984, as a result of the 1983 Social Security Amendments; (2) 255 Article III judges, who were on senior status, did not become subject to Social Security withholdings because they were considered to be retired; and (3) 677 non-Article III judges became subject to Social Security based upon section 410(a)(5)(E), title 42, United States Code.

22. OPM estimates that as of September 1984, excluding employees of the United States Postal Service, 268,006 civilian federal employees were subject to Social Security and 1,777,247 civilian federal employees were not subject to Social Security.

23. OPM estimates that as of September 1991, 1,415,132 civilian federal employees, were subject to Social Security while 1,523,174 civilian federal employees were not subject to Social Security.

24. Social Security data indicate that as of December 1991, 88.3% of the total labor force (excluding the Armed Forces) and 93.5% of the paid civilian population are covered by Social Security.

25. OPM estimates that as of September 1991 there were 70,920 federal employees first employed prior to 1984 (under CSRS) who had a break in service of more than 365 days, who were rehired after January 1, 1984, and met the requirements of 5 U.S.C. § 8402(b).

26. According to OPM, four percent of the pre-1984 federal employees who were eligible to transfer from CSRS to FERS opted to do so. The remaining 96 percent of eligible employees opted to retain CSRS coverage only.

27. Attached to these stipulations is the following referenced table published by the U.S. Department of Health and Human Services, Social Security Administration in the Social Security Bulletin, Annual Statistical Supplement, 1987. The parties stipulate that the table is a true and correct copy of the material published in the 1987 Supplement.

Table 4.	Labor force and estimated workers covered under social insurance programs, 1939-86.

28. Attached to these stipulations are the following referenced tables published by the U.S. Department of Health and Human Services, Social Security Administration in the Social Security Bulletin, Annual Statistical Supplement, 1992. The parties stipulate that the tables are true and correct copies of the materials published in the 1992 Supplement.

Table 2.A3.	Annual maximum taxable earnings and actual contribution rates, 1937-93 and thereafter.
Table 2.A4.	Maximum annual amount of contribution, 1937-93.
Table 3.B1.	Labor force and estimated workers covered under social insurance programs, 1960-91.

29. Attached to these stipulations are copies of sections 01901.612, 01901.614, and 01901.616 from the Social Security Administration's Program Operations Manual System. The parties stipulate that the attached materials are true and correct copies of the published materials.

The parties submit these joint stipulations without prejudice to their ability to enter into additional joint stipulations or to the ability of either party to submit proposed findings of fact.

Respectfully submitted,

FRANK W. HUNGER
Assistant Attorney General

DAVID M. COHEN
Director

STEVEN S. ROSENTHAL
Morrison & Foerster
2000 Pennsylvania Avenue, N.W., Suite 5500
Washington, D.C. 20006
Tel.: (202) 887-1500

Counsel for Plaintiffs

JEANNE E. DAVIDSON
Assistant Director
Commercial Litigation Branch
Civil Division
Department of Justice
Attn: Classification Unit
2nd Floor, Todd Building
Washington, D.C. 20530
Tel.: (202) 307-6288

Attorneys for Defendant

Date: 23 July 1993

Table 4.—Labor force and estimated workers covered under social insurance programs, 1939-86

[In millions]

Employment and coverage status	1939 [1]	1949 [1]	1960	1970	1980	1983	1984	1985	1986
Total labor force	55.6	63.7	73.1	86.3	109.1	113.5	115.7	117.5	119.8
Paid civilian population	43.6	56.7	64.6	77.8	98.9	102.2	105.5	107.7	110.3
Wage and salary workers	33.2	45.9	55.3	70.9	90.2	93.0	96.4	98.5	101.0
Self-employed	10.4	10.8	9.3	6.9	8.7	9.2	9.1	9.2	9.3
Unpaid family workers	2.1	2.0	1.4	.9	.6	.6	.5	.4	.3
Unemployed	9.5	3.4	4.5	4.7	7.4	9.0	8.0	7.7	7.5
Armed Forces [2]	.4	1.6	2.5	3.0	2.1	1.7	1.7	1.7	1.7
Civilian population covered by public retirement programs	27.2	40.1	60.9	75.2	96.4	99.8	104.7	106.9	109.7
OASDHI [3]	24.0	34.3	55.4	69.1	89.3	92.7	97.5	99.7	102.5
Wage and salary workers	24.0	34.3	48.0	63.3	81.8	84.5	89.0	91.2	93.8
Self-employed	...	...	7.4	5.8	7.5	8.2	8.5	8.5	8.7
Railroad Retirement system	1.2	1.4	.9	.6	.5	.4	.4	.3	.3
Government employees retirement systems [4]	2.0	4.4	4.6	5.5	6.6	6.7	6.8	6.9	6.9
Civilian population covered by other social insurance programs:									
Unemployment insurance [5]	22.6	33.1	43.7	55.8	90.4	91.8	95.8	98.2	(5)
Workers' compensation	22.0	35.3	44.6	59.0	79.1	80.9	84.5	87.0	(5)
Temporary disability insurance	...	5.3	11.3	14.6	18.4	18.7	19.3	19.8	(5)

[1] Monthly average; for all other years, data as of December.

[2] Beginning in 1983, includes armed forces in United States only.

[3] Excludes members of the Armed Forces. Railroad employees are shown separately.

[4] Excludes State and local government employees covered by both OASDHI and their own retirement program. Data represent yearly average.

[5] Data not available.

[6] Includes private and government employers covered by Unemployment Insurance and Unemployment Insurance for Civilian Federal Employees programs.

Source: Labor-force data from the Bureau of the Census, Current Population Survey reported in **Employment and Earnings.** Social insurance coverage estimates prepared by the Social Security Administration.

C-10

BEST AVAILABLE COPY

Table 2.A3.—Annual maximum taxable earnings and actual contribution rates, 1937–93 and thereafter

Beginning—	Annual maximum taxable earnings		Contribution rate (percent)							
			Employer and employee, each				Self-employed person			
	OASDI	HI	Total	OASI	DI	HI	Total	OASI	DI	HI
1937	$3,000	...	1.0	1.0	...	...	...	...	...	...
1950	3,000	...	1.5	1.5	...	...	...	...	...	...
1951	3,600	...	1.5	1.5	...	...	2.25	2.25	...	...
1954	3,600	...	2.0	2.0	...	...	3.0	3.0	...	...
1955	4,200	...	2.0	2.0	...	...	3.0	3.0	...	...
1957	4,200	...	2.25	2.0	0.25	...	3.375	3.0	0.375	...
1959	4,800	...	2.5	2.25	.25	...	3.75	3.375	.375	...
1960	4,800	...	3.0	2.75	.25	...	4.5	4.125	.375	...
1962	4,800	...	3.125	2.875	.25	...	4.7	4.325	.375	...
1963	4,800	...	3.625	3.375	.25	...	5.4	5.025	.375	...
1966	6,600	$6,600	4.2	3.5	.35	0.35	6.15	5.275	.525	0.35
1967	6,600	6,600	4.4	3.55	.35	.5	6.4	5.375	.525	.5
1968	7,800	7,800	4.4	3.325	.475	.6	6.4	5.0875	.7125	.6
1969	7,800	7,800	4.8	3.725	.475	.6	6.9	5.5875	.7125	.6
1970	7,800	7,800	4.8	3.65	.55	.6	6.9	5.475	.825	.6
1971	7,800	7,800	5.2	4.05	.55	.6	7.5	6.075	.825	.6
1972	9,000	9,000	5.2	4.05	.55	.6	7.5	6.075	.825	.6
1973	10,800	10,800	5.85	4.3	.55	1.0	8.0	6.205	.795	1.0
1974	13,200	13,200	5.85	4.375	.575	.9	7.9	6.185	.815	.9
1975	[1] 14,100	[1] 14,100	5.85	4.375	.575	.9	7.9	6.185	.815	.9
1976	[1] 15,300	[1] 15,300	5.85	4.375	.575	.9	7.9	6.185	.815	.9
1977	[1] 16,500	[1] 16,500	5.85	4.375	.575	.9	7.9	6.185	.815	.9
1978	[1] 17,700	[1] 17,700	6.05	4.275	.775	1.0	8.1	6.01	1.09	1.0
1979	22,900	22,900	6.13	4.33	.75	1.05	8.1	6.01	1.04	1.05
1980	25,900	25,900	6.13	4.52	.56	1.05	8.1	6.2725	.7775	1.05
1981	29,700	29,700	6.65	4.7	.65	1.3	9.3	7.025	.975	1.3
1982	[1] 32,400	[1] 32,400	6.7	4.575	.825	1.3	9.35	6.8125	1.2375	1.3
1983	[1] 35,700	[1] 35,700	6.7	4.775	.625	1.3	9.35	7.1125	.9375	1.3
1984	[1] 37,800	[1] 37,800	[2] 7.0	5.2	.5	1.3	[2] 14.0	10.4	1.0	2.6
1985	[1] 39,600	[1] 39,600	7.05	5.2	.5	1.35	[2] 14.1	10.4	1.0	2.7
1986	[1] 42,000	[1] 42,000	7.15	5.2	.5	1.45	[2] 14.3	10.4	1.0	2.9
1987	[1] 43,800	[1] 43,800	7.15	5.2	.5	1.45	[2] 14.3	10.4	1.0	2.9
1988	[1] 45,000	[1] 45,000	7.51	5.53	.53	1.45	[2] 15.02	11.06	1.06	2.9
1989	[1] 48,000	[1] 48,000	7.51	5.53	.53	1.45	[2] 15.02	11.06	1.06	2.9
1990	[3] 51,300	[3] 51,300	7.65	5.6	.6	1.45	15.3	11.2	1.2	2.9
1991	[3] 53,400	[4] 125,000	7.65	5.6	.6	1.45	15.3	11.2	1.2	2.9
1992	[3] 55,500	[3] 130,200	7.65	5.6	.6	1.45	15.3	11.2	1.2	2.9
1993	[1] 57,600	[1] 135,000	7.65	5.6	.6	1.45	15.3	11.2	1.2	2.9
Future schedule:										
1994-99	(1)	(1)	7.65	5.6	.6	1.45	15.3	11.2	1.2	2.9
2000 and thereafter	(1)	(1)	7.65	5.49	.71	1.45	15.3	10.98	1.42	2.9

[1] Based on automatic adjustment, under 1972a legislation, in proportion to increases in average wage level.

[2] Includes tax credit, see table 2.A5.

[3] Based on automatic adjustment, under 1972a legislation, using a transitional rule, specified by the Omnibus Budget Reconciliation Act of 1989, for computing a "deemed" average annual wage for 1988, 1989, and 1990.

[4] Based on 1990 legislation.

CONTACT: Herman Grundmann/Greg Diez (410) 965-0183/0153 for further information.

Table 2.A4.—Maximum annual amount of contribution, 1937–93

Beginning—	Employee				Self-employed person			
	Total	OASI	DI	HI	Total	OASI	DI	HI
1937	$30.00	$30.00	...	...	...	...	...	...
1950	45.00	45.00	...	...	...	...	...	...
1951	54.00	54.00	...	...	$81.00	$81.00	...	...
1954	72.00	72.00	...	...	108.00	108.00	...	...
1955	84.00	84.00	...	...	126.00	126.00	...	...
1957	94.50	84.00	$10.50	...	141.75	126.00	$15.75	...
1959	120.00	108.00	12.00	...	180.00	162.00	18.00	...
1960	144.00	132.00	12.00	...	216.00	198.00	18.00	...
1962	150.00	138.00	12.00	...	225.60	207.60	18.00	...
1963	174.00	162.00	12.00	...	259.20	241.20	18.00	...
1966	277.20	231.00	23.10	$23.10	405.90	348.15	34.65	$23.10
1967	290.40	234.30	23.10	33.00	422.40	354.75	34.65	33.00
1968	343.20	259.35	37.05	46.80	499.20	396.825	55.575	46.80
1969	374.40	290.55	37.05	46.80	538.20	435.825	55.575	46.80
1970	374.40	284.70	42.90	46.80	538.20	427.05	64.35	46.80
1971	405.60	315.90	42.90	46.80	585.00	473.85	64.35	46.80
1972	468.00	364.50	49.50	54.00	675.00	546.75	74.25	54.00
1973	631.80	464.40	59.40	108.00	864.00	670.14	85.86	108.00
1974	772.20	577.50	75.90	118.80	1,042.80	816.42	107.58	118.80
1975	824.85	616.875	81.075	126.90	1,113.90	872.085	114.915	126.90
1976	895.05	669.375	87.975	137.70	1,208.70	946.305	124.695	137.70
1977	965.25	721.875	94.875	148.50	1,303.50	1,020.525	134.475	148.50
1978	1,070.85	756.675	137.175	177.00	1,433.70	1,063.77	192.93	177.00
1979	1,403.77	991.57	171.75	240.45	1,854.90	1,376.29	238.16	240.45
1980	1,587.67	1,170.68	145.04	271.95	2,097.90	1,624.58	201.37	271.95
1981	1,975.05	1,395.90	193.05	386.10	2,762.10	2,086.43	289.57	386.10
1982	2,170.80	1,482.30	267.30	421.20	3,029.40	2,207.25	400.95	421.20
1983	2,391.90	1,704.675	223.125	464.10	3,337.95	2,539.1625	334.6875	464.10
1984 [1]	2,646.00	1,965.60	189.00	491.40	5,292.00	3,931.20	378.00	982.80
1985 [1]	2,791.80	2,059.20	198.00	534.60	5,583.60	4,118.40	396.00	1,069.20
1986 [1]	3,003.00	2,184.00	210.00	609.00	6,006.00	4,368.00	420.00	1,218.00
1987 [1]	3,131.70	2,277.60	219.00	635.10	6,263.40	4,555.20	438.00	1,270.20
1988 [1]	3,379.50	2,488.50	238.50	652.50	6,759.00	4,977.00	477.00	1,305.00
1989 [1]	3,604.80	2,654.40	254.40	696.00	7,209.60	5,308.80	508.80	1,392.00
1990	3,924.45	2,872.80	307.80	743.85	7,848.90	5,745.60	615.60	1,487.70
1991	5,123.30	2,990.40	320.40	1,812.50	10,246.60	5,980.80	640.80	3,625.00
1992	5,328.90	3,108.00	333.00	1,887.90	10,657.80	6,216.00	666.00	3,775.80
1993	5,528.70	3,225.60	345.60	1,957.50	11,057.40	6,451.20	691.20	3,915.00

[1] Includes tax credit, see table 2.A5.

Table 2.A5.—Tax credits, 1984–89[1]

Act	Group	Tax payable under—	Percent of earnings	Tax credit, effective with respect to—
1983	Employee	Federal Insurance Contributions Act (FICA)	0.3	Remuneration paid in calendar year 1984
	Self-employed	Self-Employment Contributions Act (SECA)	2.7	Self-employment income for taxable years beginning in 1984
			2.3	Self-employment income for taxable years beginning in 1985
			2.0	Self-employment income for taxable years beginning in 1986, 1987, 1988, and 1989

[1] During this period, scheduled taxes were credited to the Social Security trust funds, monies for tax credits were paid from the general fund of the Treasury, and the reduced tax rates were paid by employees and the self-employed.

CONTACT: Herman Grundmann/Greg Diez (410) 965-0183/0153 for further information.

Table 3.B1.—Labor force and estimated workers covered under social insurance programs, 1960-91

(In millions)

Employment and coverage status [1]	1960	1970	1980	1985	1987	1988	1989	1990	1991
Total labor force	73.1	86.3	109.1	117.5	122.0	123.8	125.7	126.2	126.7
Paid civilian population	64.6	77.8	98.9	107.7	113.3	115.6	117.4	117.0	116.2
Unpaid family workers	1.4	.9	.6	.4	.4	.4	.3	.3	.3
Unemployed	4.5	4.7	7.4	7.7	6.5	6.1	6.3	7.3	8.6
Armed Forces [2]	2.5	3.0	2.1	1.7	1.8	1.7	1.7	1.6	1.6
Civilian population covered by public retirement programs	60.9	75.2	96.4	106.6	113.5	116.0	117.9	117.7	117.9
OASDHI [3]	55.4	69.1	89.3	100.3	106.3	108.7	110.5	110.2	[4] 110.5
Railroad Retirement system	.9	.6	.5	.3	.3	.3	.3	.3	.3
Government employees retirement systems [5]	4.6	5.5	6.6	6.0	6.9	7.0	7.1	7.2	7.1
Civilian population covered by other social insurance programs:									
Unemployment insurance [6]	43.7	55.8	90.4	98.2	103.7	106.9	108.8	109.5	106.0
Temporary disability insurance	11.3	14.6	18.4	19.8	21.6	21.8	22.2	22.3	(7)
Workers' compensation	44.6	59.0	79.1	85.1	90.0	92.8	95.3	96.7	95.1

[1] As of December.
[2] Beginning 1983, includes Armed Forces in United States only.
[3] Excludes members of the Armed Forces. Railroad employees are shown separately.
[4] Includes some coverage extensions.
[5] Excludes employees covered by both OASDHI and their own retirement program. Data represent yearly average.
[6] Includes private and government employees covered by Unemployment Insurance and Unemployment Insurance for Civilian Federal Employees programs.
[7] Data not available.

Source: Labor-force data from the Bureau of the Census, Current Population Survey reported in *Employment and Earnings*. Social insurance coverage estimates prepared by the Social Security Administration.

BEST AVAILABLE COPY

CONTACT: Ann Bixby (202) 282-7222 for further information.

Federal Civilian Employment After 1983

01901.612 Employees of the Federal Government and Federal Instrumentalities—After 1983

The 1983 Amendments and subsequent legislation provide coverage on or after January 1, 1984, to service of Federal civilian employees (and employees of Federal instrumentalities) who on or after that date:

A. are hired for the first time;

B. return to Federal employment after a separation of more than 365 days, EXCEPT this does not apply to those employees who previously held positions not covered by Social Security *and* who:

   1. return to noncovered Federal service after being detailed or transferred to service with an international organization listed in RS 01901.600; or

   2. return to noncovered Federal service after separation to perform service with the American Institute in Taiwan; or

   3. exercise restoration or reemployment rights after service as a member of a uniformed service (including service in the National Guard and temporary service in the Coast Guard Reserve); or

   4. return to noncovered Federal Service after employment by an Indian tribal government.

C. return to Federal employment after separation of *less* than 365 days AND the prior employment was subject to full Social Security coverage and FICA taxation under the old-law provisions;

D. were in the employ of the Federal Government in a position subject to full Social Security coverage and taxation under the old-law (e.g., in the uniformed services or a temporary employee);

E. elect to be subject to the Federal Employees Retirement System rather than the Civil Service Retirement System.

(See RS 01901.614 for special provisions pertaining to Federal officials. See RS 01901.616 for special provisions pertaining to legislative branch employees.)

In determining whether someone is hired for the first time or had prior employment, the present hiring agency need not be the same as the previous employing agency. Consider all employment for a Federal agency or instrumentality to be employment for the United States.

The following illustrates the above rules:

Example 1:

After graduation from college in July 1984, Pete accepted an appointment with the Department of State. He had no prior Federal civilian service. Pete's services as an employee of the Department of State are covered under Social Security. It is immaterial that he may be covered also under the Foreign Service Retirement System.

Example 2:

Warren was an investigator in a career conditional appointment status for a Federal agency from October 22, 1979, to September 1, 1983, when he resigned to go back to school for a postgraduate degree. After the spring semester, he abandoned his studies and received an appointment with another Federal agency effective August 1, 1984. Warren's services as an employee of the Federal Government are not covered under full Social Security because the break in service was less than 365 days and the prior service was not covered under Social Security. Warren is covered under the Civil Service Retirement System. He is also required to contribute the HI portion of Social Security tax.

Example 3:

Marie, a career Social Security employee, was on maternity leave effective July 15, 1982. After using up her annual and sick leave, she was granted leave without pay (LWOP) from November 27, 1982, through February 15, 1983, when she resigned. On April 12, 1984, she was rehired by SSA. Marie's services are covered under Social Security because she had a break in service in excess of 365 days (February 16, 1983 - April 11, 1984). She is also covered under the Federal Employee's Retirement System.

Example 4:

Allen was hired on November 24, 1983 by the Department of Commerce as a temporary employee. As such, he was not eligible for coverage under the Civil Service Retirement System and was covered by Social Security. On February 4, 1984, he was given a career-conditional appointment. Although November 24, 1983 is the date he was hired, he was not covered by the Civil Service Retirement System on January 1, 1984. Therefore, his services continue to be covered by full Social Security. He will also be covered by the Federal Employees' Retirement System.

Example 5:

James was discharged from the Army with 6 years service on July 7, 1984. Five months later he was hired by SSA. Service in the Armed Forces is considered to be service in the employ of the United States. However, as a servicemember he was covered by Social Security. His hiring by SSA was not the result of an exercise of his reemployment rights. Since his employment for the Federal Government which ended July 7, 1984 was covered by Social Security, the 365-day rule does not apply and his employment by SSA is covered by Social Security.

Example 6:

John was a career employee of HHS. In March 1980, he resigned to serve a 5-year assignment with the World Health Organization. In July 1985 he returned to his former employment with HHS. His services are excluded from Social Security because he meets an exception to the 365-day separation rule.

01901.614 Federal Officials

Service of the following Federal employees and officials is covered effective with respect to service performed after December 31, 1983.

A. The President and the Vice-President.

B. Individuals placed in the Executive Schedule under section 5312 through 5317 of the title 5, U.S. Code. Generally, this includes level I-V positions as cabinet heads, subcabinet members, independent agency top staff, and commission members. These are political appointees, appointed by the President with the advice and consent of the Senate. On occasion, when creating new positions, Congress will not amend the Executive Schedule, but will state that the position will be paid at a rate equivalent to a rate listed in the Executive Schedule. Service of individuals holding such positions is not automatically covered as of January 1, 1984. Coverage of service of such individuals hired on or after that date will depend upon whether the individuals are newly hired Federal employees.

C. Noncareer appointees in the Senior Executive Service and noncareer members of the Senior Foreign Service.

D. Individuals appointed by the President (or his designee) or the Vice President under sections 105(a)(1), 106(a)(1) or 107(a)(1) or (b)(1) of title 3, U.S. Code, if the maximum level of basic pay for such

position is at or above the rate for level V of the Executive Schedule. Generally, they serve in the White House Office, on the staff of the Vice President, or on the Domestic Policy Staff and the Office of Administration. Some of these individuals are career civil servants whose employment would not ordinarily be covered. There may also be appointments not made under any of these authorities. If so, service in such positions is not automatically covered.

E. The Chief Justice of the United States, an Associate Judge [sic] of the Supreme Court, a judge of the United State [sic] court of appeals, a judge of a United States district court (including the district court of a territory), a judge of the United States Claims Court, a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States Magistrate, or a referee in bankruptcy or United States bankruptcy judge.

F. All Members, Delegates, or Resident Commis-sioners of or to the Congress.

01901.616 Legislative Branch Employees

Special rules exist for employees of the legislative branch. That branch consists of the Senate, the House of Representatives, the Office of the Architect of the Capitol, the United States Botanical Garden, the General Accounting Office, the Government Printing Office, the Library of Congress, the Office of Technology Assessment, the Congressional Budget Office, and the Copyright Royalty Tribunal.

Under old-law provisions, service in the employ of the legislative branch was totally excluded from Social Security coverage. At the same time participation in the Civil Service Retirement System (CSRS) was not mandatory for legislative branch employees, although they could elect to participate.

Under current law, service performed by a legislative branch employee, hired for the first time by the Federal Government after December 31, 1983, is subject to Social Security coverage and taxation. In general, legislative branch employees who were participating in CSRS or another Federal retirement system (other than one for members of the uniformed services) on December 31, 1983 are excluded from Social Security. However, if they receive lump-sum payments from the Federal retirement system after December 31, 1983 or otherwise cease to be subject to CSRS after that date while performing service in the legislative branch, they will be covered under Social Security. However, a legislative branch employee who would be covered under Social Security as a result of this provision and who received or filed an application for a lump-sum payment before June 15, 1984 from a Federal retirement system or who otherwise ceased to be subject to the CSRS after December 31, 1983 could be excluded from Social Security if he joined the CSRS before August 19, 1984. A legislative branch employee who is hired July 19, 1984, after a break in Federal service of more than 365 days and who otherwise meets these requirements could be excluded from Social Security if he joined CSRS within 30 days after he is hired.

The above is intended only as a general statement of complex rules. It should not be relied upon in advising legislative branch employees of their status.

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

THE UNITED STATES, Defendant.

DECLARATION OF PETER R. LYNN

PETER R. LYNN deposes and says:

A. QUALIFICATIONS

1. I am the Founder and Chief Executive Officer of Government Retirement and Benefits, Inc. ("GRB") of 5999 Stevenson Avenue, #403, Alexandria, Virginia 22304. I am also Secretary and Treasurer of GRB. I have served in these capacities since March 1986.

2. I graduated cum laude from Lycoming College in Pennsylvania with a B.A. degree in economics and have completed graduate work in both accounting and economics.

3. I received my certification as a Certified Employee Benefits Specialists ("CEBS") in 1980 from the University of Pennsylvania Wharton School and the International Foundation of Employee Benefit Plans.

4. I am coeditor of GRB's books "YOUR CIVIL SERVICE RETIREMENT SYSTEM" and "YOUR FEDERAL EMPLOYEES RETIREMENT SYSTEM."

5. I served for 17 years with the United States General Accounting Office ("GAO") as an expert on federal employee retirement programs. While serving with GAO, I prepared reports for the Congress on the benefit provisions of over 100 different federal employee retirement plans and the relationships of these plans with the Social Security program.

During my last 18 months with GAO (January 1985 to June 1986), I was assigned to the United States Senate Governmental Affairs Committee to assist in designing the new Federal Employees Retirement System ("FERS").

6. I have personal knowledge of the facts set forth in this Declaration.

B. THE SOCIAL SECURITY SYSTEM IN GENERAL

7. Employees whose employment is covered by Social Security are subject to a Social Security tax, comprised of two portions. One portion of the tax is used to fund old age, survivor, and disability insurance benefits and is referred to as the OASDI portion. The second portion is used to fund hospital insurance benefits and is referred to as the HI or Medicare portion.

8. Unlike income tax, the Social Security program is not a general obligation of all citizens. Rather, Social Security withholdings constitute a "premium tax" used to fund a social insurance program. Unlike income tax, Social Security payments are contributed with a specific focus on the retirement, survivors' and disability benefits available under this social insurance program.

9. In the early 1980s, the federal government became concerned about the financial condition and integrity of the Social Security program and Congress began to look for ways to increase the funds contributed to the program.

10. Prior to 1983, federal civilian employees covered by a federal retirement plan (e.g., Civil Service Retirement System, Foreign Service Retirement System, Federal Judiciary Retirement System) were excluded from coverage under the Social Security program. This included the vast majority of federal employees, including federal judges, members of Congress and their staff, Executive branch political officials, appointees and their staff.

11. Effective January 1983, the Tax Equity and Fiscal Responsibility Act of 1982 (P.L. 97-248, § 278, approved September 3, 1982) required all federal civilian employees to pay the HI (Medicare) portion of Social Security.

C. SOCIAL SECURITY ACT AMENDMENTS OF 1983

12. The Social Security Act Amendments of 1983 (P.L. 98-21, approved April 20, 1983) ("the 1983 Amendments"), made all federal employees who were first hired after December 31, 1983, subject to full Social Security coverage. The Act required such employees to pay both the OASDI and HI portions of the Social Security tax.

13. The 1983 Amendments also provided that the following groups of employees were to be subject to full Social Security coverage even though their first date of federal employment was prior to January 1, 1984.

- Employees who returned to federal service after a separation of more than 365 days.
- Employees who returned to federal service after a separation of less than 366 days and their prior federal civilian service was subject to full Social security coverage under the Social Security laws in effect prior to 1983. This situation would apply primarily to employees hired for temporary or intermittent federal service prior to January 1, 1984, and who were first converted to a permanent appointment after December 31, 1983.

Coverage of Senior Officials

14. Before 1984, most federal "senior officials" were covered by the Civil Service Retirement System (CSRS) and therefore were excluded from Social Security (OASDI)

coverage. Members of Congress were excluded from Social Security coverage before 1984 regardless of whether or not they elected CSRS coverage.

15. The 1983 Social Security Amendments extended mandatory OASDI coverage to certain senior officials, effective January 1, 1984, even though most of these senior officials also had other retirement coverage as federal employees.

16. Senior officials affected by the 1983 amendments include:

(a) The President and Vice President of the United States.

(b) Certain individuals in Executive Schedule positions listed under sections 5312 through 5317 of title 5, United States Code. Examples of these individuals include Cabinet level officials; Deputy, Under, and Assistant Secretaries; Agency Directors and Assistant Directors; and Executive Branch Department level General Counsels.

(c) Noncareer appointees in the Senior Executive Service or a noncareer member of the Senior Foreign Service.

(d) Individuals on the personal staff of the President and Vice President appointed under sections 105(a)(1), 106(a)(1), or 107(a)(1) or (b)(1) of title 3 of the U.S. Code, including the Domestic Policy Staff and the Office of Administration, if the maximum rate of pay for their positions is at or above the pay rate for level V of the Executive Schedule.

(e) Service performed as a Chief Justice of the United States, an Associate Justice of the Supreme Court, a judge of a United States court of appeals, a judge of a United States district court (including the

district court of a territory), a judge of the United States Claims Court, a judge of the United States Court of International Trade, a judge of the United States Tax Court, a United States magistrate, or a referee in bankruptcy or United States bankruptcy judge.

(f) Service performed as a Member, Delegate, or Resident Commissioner of or to the Congress.

(g) Any other service in the legislative branch of the Federal Government if such service was being performed by an individual who, on December 31, 1983, was not covered by the Civil Service Retirement System (CSRS). Such service refers primarily to congressional employees. Like Members of Congress, congressional employees did not have to participate in the CSRS. However, after P.L. 98-21 was enacted, they had to decide before December 31, 1983, whether they wanted to be covered by CSRS or be covered by full Social Security beginning January 1, 1984.

17. Except as outlined in paragraphs 16(a) through 16(g) above, the 1983 Amendments did not extend mandatory Social Security coverage to:

- Employees who were covered by CSRS on December 31, 1983.
- Employees who have been continuously covered under CSRS since December 31, 1983, and who separate from federal service, and return to Government service *within* 365 days.

18. With the exception of federal judges, most of the employees to whom Social Security was mandatorily extended in the 1983 Amendments were elected officials, political officials of the Executive branch, or staff for these officials.

D. FEDERAL EMPLOYEES' TEMPORARY ADJUSTMENT ACT OF 1983

Interim plan offsets Social Security withholding

19. To coordinate other federal retirement coverage with Social Security and offset the burden of Social Security deductions for those mandatorily added by the 1983 Social Security Amendments, Title II of P.L. 98-168, the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (approved November 29, 1983) (the "Adjustment Act"), provided an "interim plan" for employees first hired after December 31, 1983, and for senior officials who would be covered under both the CSRS and full Social Security as a result of the Social Security Amendments of 1983.

20. Under the interim plan (which was intended to be temporary until a new retirement system could be designed and implemented for employees first hired after December 31, 1983) the CSRS employee contribution rate for individuals covered by both CSRS and full Social Security was reduced from 7.0 percent to 1.3 percent of pay. The difference of 5.7 percentage points was equivalent to the OASDI portion of the Social Security tax at that time.

Special elections for senior officials

21. Under the Adjustment Act, senior officials who (1) were to be mandatorily covered by full Social Security under the provisions of the 1983 Amendments and (2) who were participating in a federal retirement plan which required employee contributions were given the opportunity to make elections regarding their retirement coverage by December 31, 1983. Instead of the interim plan, these officials could elect:

- Full CSRS coverage and full Social Security taxes; or
- No CSRS coverage (with no CSRS with-holdings) and full Social Security taxes.

A true and correct copy of the form these officials were provided for making these elections is attached as Exhibit D-1.

22. Senior officials' elections took effect January 1, 1984. Senior officials who made no election were automatically covered under the interim plan on January 1, 1984, and paid the full Social Security tax and 1.3 percent of pay for CSRS.

23. Under the Adjustment Act, (1) the President and Vice President, (2) individuals in positions placed in the Executive Schedule sections 5312 through 5317, (3) noncareer SES appointees, (4) Presidential staff and (5) Members of Congress had the option to make special elections.

24. Under the Adjustment Act, Members of Congress who were not participating in CSRS before December 31, 1983, could elect, by December 31, 1983, either the interim plan or full CSRS coverage. If they made no election, they continued to have no CSRS coverage.

25. Members of Congress who were participating in CSRS on December 31, 1983, could elect, by December 31, 1983, either no CSRS coverage or full CSRS coverage. If they made no election, they were covered under the interim plan on January 1, 1984.

26. Members of Congress who were not participating in CSRS on December 31, 1983, (including newly elected Members) could later elect the interim plan, but not full CSRS coverage. *See* P.L. 98-168, § 208.

27. Under the Adjustment Act, neither the provisions for the interim plan or for the special elections (for those mandatorily covered under the 1983 Social Security Amendments) were applicable to federal judges. Consequently, unlike Members of Congress and Executive branch senior officials, federal judges were given no choices which would have afforded them financial relief from the

impact from the reduction in their salaries due to the newly imposed Social Security tax. Therefore, federal judges remained subject to full Social Security in addition to their statutory judicial retirement plan.

E. DEFICIT REDUCTION ACT OF 1984

Second opportunity for special elections

28. To coordinate other federal retirement coverage with Social Security and offset the burden of Social Security deductions for those mandatorily added by the 1983 Social Security Amendments, the Deficit Reduction Act of 1984 (P.L. 98-369, approved July 18, 1984) gave senior officials who had been eligible to make special elections under the Adjustment Act a second opportunity to make elections regarding their retirement coverage. During this second opportunity, senior officials had the same election options they had under the Adjustment Act:

(a) Full coverage under both Social Security and CSRS; or

(b) Coverage under Social Security only; or

(c) Coverage under Social Security and CSRS with reduced CSRS deductions.

29. An election under the Deficit Reduction Act of 1984 was valid only if it was made before September 16, 1984. If senior officials failed to make an election before the deadline, they continued to have the retirement coverage in effect on January 1, 1984.

30. Individuals who became senior officials after December 31, 1983 were not eligible to make any special elections concerning their retirement coverage, but if they became senior officials during 1984, 1985, or 1986, they were covered under the Adjustment Act's interim plan provisions, regardless of their previous coverage under CSRS.

31. Again, in contrast to Members of Congress and Executive branch senior officials, the Deficit Reduction Act of 1984 did not provide federal judges any special elections concerning their retirement coverage.

F. FEDERAL EMPLOYEES' RETIREMENT SYSTEM ACT OF 1986

32. In 1986, Congress completed its work in designing a new federal employee retirement plan to replace the "interim plan" established by the 1983 Adjustment Act. In designing the plan, known as FERS, the overall objectives were to establish retirement benefits for new employees that, when combined with Social Security benefits, would (1) provide an adequate retirement income and (2) would not cost new employees any more than what federal employees not covered by Social Security are required to pay.

33. The Federal Employees' Retirement System Act of 1986 (P.L. 99-335, approved June 6, 1986) (the "FERS Act") established a new federal retirement system for individuals first employed by the government after December 31, 1983. Coverage under the new system took effect January 1, 1987.

34. Individuals covered by FERS are required to pay the full Social Security tax and a small contribution for their FERS coverage. (An employee's FERS contribution is a percentage of pay and equals the difference between 7.0 percent and the current OASDI portion of the Social Security tax.) For employees covered by FERS, the government also automatically contributes 1 percent of their pay to the Federal Thrift Savings Plan (TSP). At their discretion, FERS employees may contribute up to 10 percent of their basic pay to their TSP account, and can receive up to a 4 percent Government match on their TSP contributions. Federal judges are not covered by FERS, but they may contribute to the TSP. *See* 5 U.S.C. §8440a.

Federal judges are not eligible for a Government match on their TSP contributions.

35. The FERS Act also established a CSRS Offset plan to replace the CSRS interim plan. Rather than placing all persons covered by the CSRS interim plan under FERS, the FERS Act excluded from FERS coverage employees who, as of December 31, 1986, had at least 5 years of creditable civilian service under CSRS. Under the CSRS Offset plan, an employee's CSRS retirement deductions are reduced (offset) by the OASDI portion of the Social Security tax.

36. The FERS Act also excluded from FERS coverage all senior officials who had special election opportunities in December 1983 and September 1984 and who had continued to serve as senior officials continuously from December 31, 1983, without a break in service exceeding 365 days. The elections these senior officials made in December 1983 and September 1984 remained in effect after FERS began, regardless of the amount of civilian service they had at the time of the election.

Open season for elections

37. The FERS Act provided an opportunity for employees covered by the CSRS and CSRS Offset plans to transfer to FERS retirement coverage. This opportunity or "open season" began July 1, 1987, and ended December 31, 1987. Employees who did not elect to transfer to FERS during the open season, retained their prior coverage.

38. Senior officials who were given special election opportunities under the Adjustment Act also were given special election opportunities under the FERS Act if they had served continuously in such a position without a break exceeding 365 days.

39. Under FERS, senior officials and Members of Congress were given the following options during the open season:

(a) Retain previous retirement coverage:

- Full Social Security and full CSRS
- Social Security only
- CSRS Offset coverage (which was previously CSRS interim coverage)

(b) Elect coverage under CSRS with reduced retirement deductions (CSRS Offset); or

(c) Elect coverage under FERS.

A true and correct copy of the forms officials were provided for making these elections is attached as Exhibit D-2.

40. Again, unlike senior executive officials, Members of Congress, and others covered by CSRS or CSRS Offset plans, federal judges did not have the opportunity to make any of these elections.

G. CONCLUSIONS

41. The overall objectives of the 1983 Social Security Amendments were to improve the financial condition and integrity of the Social Security program. Two primary provisions of the 1983 Amendments pertaining to federal employment were that (1) all federal employees first hired after December 31, 1983, would be covered by full Social Security and (2) certain federal employees hired before January 1, 1984, would also be covered by Social Security.

42. Based on my work at GAO and consequential interactions with Members of Congress and congressional staff, the following is my professional opinion as to the reasons for these two provisions:

(a) The requirement that all federal employees hired after December 31, 1983 be covered by full Social Security was intended to provide an immediate infusion of funds for the Social Security program with relatively little or no immediate increase in Social Security benefit payments.

(b) The requirement that certain federal employees first hired before January 1, 1984, would also be covered by Social Security on that date was intended to improve the integrity of the Social Security program itself. In comparison to the total 1983 federal civilian workforce (approximately 2.5 million), the employees affected by this provision probably represented less than one-half of one percent of that workforce. It was not envisioned that their mandatory inclusion in the Social Security program would have any real impact on improving the financial condition of the program. Rather, their inclusion in the program was symbolic—it provided a signal that Members of Congress and high level Executive branch political officials (*i.e.*, collectively, that body of individuals responsible for establishing and administering federal rules, regulations, and policies) would now also have a vested interest in the future of the Social Security program.

43. The Adjustment Act, the Deficit Reduction Act, and the FERS Act, each gave employees who were mandatorily covered by full Social Security (even though they were first hired before January 1, 1984) opportunities to choose among different options and consequential costs. The choices allowed employees mandatorily covered by the 1983 Social Security Amendments an opportunity (1) to coordinate their retirement coverage between a Federal employee retirement plan and Social Security benefits and (2) to offset the reduction in salary resulting from the newly imposed Social Security tax.

44. Federal judges were the only group of employees mandatorily added to Social Security by the 1983 Amendments who were not provided with any choices allowing them to offset the economic effect of Social Security withholding.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: 8/27/1993 PETER R. LYNN

EXHIBIT D-1

ELECTION OF CIVIL SERVICE RETIREMENT COVERAGE

Part A. Instructions to Employing Agency

Give each official who is entitled to elect whether to continue retirement coverage under Public Law 98-168 a copy of this form. (These are officials whose positions are covered by civil service retirement and are listed in the Executive Schedule in sections 5312-5317 of title 5, U.S. Code, or who are covered by civil service retirement and are non-career members of the Senior Executive Service.) When the official returns the completed form, the agency must: complete the certification in part D. Provide a copy of the certified form to the employee for his or her personal records. A second copy must be filed on the right side of the individual's official personnel folder. The original must be sent to the payroll office, where it will be attached to his or her Standard Form 2806, Individual Retirement Record, which is to be closed out and sent to the Office of Personnel Management according to separate instructions to payroll offices.

If an affected official does not return a signed election before January 1, 1984, complete the identifying information in part B and the certification in part D. Send a copy to the official and file two copies as instructed above.

Enter address to which election form is to be returned.

Part B. Official's Election

Name of Official (Type or Print)	Position Title	Social Security Number

Beginning January 1, 1984, your position is covered by social security and transitional civil service retirement provisions. However, as a one-time election, you are being permitted to choose whether you want to terminate all civil service retirement or you want to continue under your present civil service retirement coverage.

IMPORTANT: BEFORE MAKING AN ELECTION, BE SURE TO READ THE INFORMATION ON THE REVERSE SIDE OF THIS FORM. RETURN THE COMPLETED FORM TO THE ADDRESS SHOWN ABOVE BEFORE JANUARY 1, 1984.

Consider your election carefully. YOU MAY NOT SUBMIT AN ELECTION OR CHANGE YOUR ELECTION AFTER JANUARY 1, 1984. If you do not return a signed form to the address given above before January 1, your agency will certify that you have not responded and you will automatically be covered under the transitional civil service retirement provisions.

See your personnel office if you have questions.

TERMINATE CIVIL SERVICE RETIREMENT COVERAGE

I elect not to participate in any civil service retirement plan. I UNDERSTAND THAT I MUST CONTRIBUTE TO SOCIAL SECURITY.

Signature	Date

CONTINUED CIVIL SERVICE RETIREMENT COVERAGE

I elect to remain under the Civil Service Retirement System on and after January 1, 1984, and to pay the contribution (7 or 7½% of pay, as applicable) for civil service retirement benefits. I UNDERSTAND THAT I MUST CONTRIBUTE TO SOCIAL SECURITY ALSO.

Signature	Date

Part C. Official's Declination

COVERAGE UNDER THE TRANSITIONAL CIVIL SERVICE RETIREMENT PROVISIONS

I understand that I have a one-time opportunity to elect to have no civil service retirement coverage at all, or to remain under the Civil Service Retirement System. I prefer to be covered under the transitional civil service retirement provisions. I UNDERSTAND THAT I MUST CONTRIBUTE TO SOCIAL SECURITY ALSO.

Signature	Date

Part D. Agency Certification

I certify that the above named official is entitled to elect retirement coverage effective January 1, 1984, under Public Law 98-168, and *(check one)*

☐ the official completed and returned this election before January 1, 1984.

☐ the official was contacted on _____ (Date form delivered) and did not complete the election before January 1, 1984.

Signature of Director of Personnel	Agency	Date

BEST AVAILABLE COPY

CIVIL SERVICE RETIREMENT ELECTION INFORMATION FOR COVERED OFFICIALS

On January 1, 1984, your position will be placed under Social Security coverage and a transitional Civil Service Retirement plan. However, Public Law 98-168 allows you to modify your Civil Service Retirement coverage. Your options and important information about them are described below. NO MATTER WHAT SELECTION YOU MAKE YOU WILL REMAIN COVERED BY SOCIAL SECURITY.

COVERAGE UNDER THE TRANSITIONAL CIVIL SERVICE PROVISIONS

Under this provision you will contribute 1.3 percent of your basic pay for civil service retirement coverage beginning on January 1, 1984.

If you retire during this transitional period for any reason other than disability, you will have to deposit the difference between the 1.3 percent you actually paid and the total amount you would have contributed under the rules for the regular Civil Service Retirement System to receive credit for service during the transitional period. If you are a disability retiree, or die in service and your survivor(s) is entitled to a survivor annuity, no deposit is necessary to receive credit for service during the transitional period. Civil service disability and survivor benefits which begin during the transitional period will, however, be offset by the amount of any Social Security benefit that is attributable to service performed after January 1, 1984. In the case of survivor benefits, the offset can be eliminated if you make a deposit before your death.

TERMINATE CIVIL SERVICE RETIREMENT COVERAGE

You may choose to end your civil service retirement coverage on December 31, 1983. Beginning January 1, 1984, you will be covered only by Social Security.

If you choose this option, you may apply to receive a refund of your civil service retirement deductions if you are not eligible for immediate annuity. Alternatively, you may choose this option, leave your civil service retirement deductions intact, and obtain a deferred annuity at age 62 if you have at least 5 years of Federal civilian service.

CONTINUED CIVIL SERVICE RETIREMENT SYSTEM COVERAGE

Under this option your coverage under the Civil Service Retirement System continues with no change, and you will continue to pay the 7% retirement deduction (7.5% if you are in a position covered by law enforcement/firefighter provisions in U.S.C. 8336(c)). You will be entitled to credit under both Social Security and the Civil Service Retirement System for your service beginning January 1, 1984.

PRIVACY ACT STATEMENT

Solicitation of this information is authorized by Public Law 98-168. The information you furnish will be used to determine your civil service retirement coverage on and after January 1, 1984. Furnishing your Social Security number, as well as other data, is voluntary, but failure to do so may result in the loss of your opportunity to make this election or the agency's inability to effect your election.

Retirement Election for Certain Senior Officials
Federal Employees Retirement System

Section 1. Instructions for Officials

- See Privacy Act Information on page 2 of this form.
- Read information on pages 3 and 4 of this form.
- Make your election in Section 3.
- Sign in Section 5.

- Be sure to read your ***FERS Transfer Handbook.***
- If you elect FERS, any CSRS designation of beneficiary (SF 2808) is cancelled. If you want to make a new designation of beneficiary, use SF 3102.

Section 2. Identifying Information *(type or print)*

Name *(Last, first, middle)*	Date of birth *(mo, dy, yr)*	Social Security Number

Section 3. Election of Retirement Coverage

Place your initials in one of the boxes below to indicate your choice of retirement coverage. (Initial only one box.)

A. Election of FERS --
This election is available to all eligible officials.

☐ I elect FERS coverage. I understand that I will continue to be covered under Social Security. I authorize that withholdings be made from my pay for both FERS and Social Security purposes. I understand that this decision is irrevocable. (If you initial this box, you must also complete Section 4.)

B. Election of CSRS Offset --
This election is available to all eligible officials.

☐ I elect CSRS Offset coverage. I understand that I will continue to be covered under Social Security. I authorize that withholdings be made from my pay for both CSRS Offset and Social Security coverage.

C. Election of Full CSRS --
This election is available only to those officials who now have full CSRS.

☐ I previously elected full CSRS coverage and I want that election to stand. I understand that I will continue to be covered by Social Security. I authorize that withholdings be made from my pay for full CSRS coverage (7, 7 1/2, or 8% of pay, as applicable) and Social Security coverage (in 1987, 5.7% of pay up to $43,800).

D. Election of No Retirement Coverage --
This election is available only to those officials who have no CSRS coverage because of their previous election.

☐ I previously elected to have no retirement coverage in addition to my Social Security coverage, and I now want that election to stand. I understand that I cannot participate in the Thrift Savings Plan.

Section 4. Former Spouse Information

If you initialed box A above, you must complete this Section.
If you initialed box B, C, or D above, skip to Section 5.

Do you have a living former spouse who has not remarried before reaching age 55 to whom a court order, on file at OPM, awards a portion of your annuity or survivor benefits based on your Federal service?

☐ Yes → Attach OPM Form 1556, Former Spouse's Consent to FERS Election, your request for waiver of consent requirement, or your request for extension of election deadline in order to modify court order.

☐ No

☐ I don't know if a court order is on file at OPM. I have attached OPM Form 1560 requesting OPM to determine whether a qualified court order is on file.

Section 5. Employee's Certification

I hereby certify that all statements made on this election are true to the best of my knowledge.

Signature	Date

Warning: Any intentional false statement in this election or willful misrepresentation relative thereto is a violation of the law punishable by a fine of not more than $10,000 or imprisonment of not more than 5 years or both. (18 USC 1001)

For Agency Use Only	Date of receipt by agency

Office of Personnel Management
5 CFR 846

OPM Form 1561
June 1987

75

Privacy Act Statement

Solicitation of this information is authorized by the Federal Employees' Retirement System Act (Public Law 99-335). The information you furnish will be used to identify records properly associated with your election, to obtain additional information if necessary, to determine and allow present or future benefits, and to maintain a unique identifiable claim file. The information may be shared with national, state, local, or other charitable or social security administrative agencies in order to determine benefits under their programs, to obtain information necessary under this program, or to report income for tax purposes. It may also be shared with law enforcement agencies when they are investigating a violation or potential violation of the civil or criminal law. Executive Order 9397 (November 22, 1943) authorizes use of the social security number. Furnishing the social security number, as well as other data, is voluntary but failure to do so may delay or make it impossible for us to determine your eligibility to receive benefits.

BEST AVAILABLE COPY

77

FERS

Retirement Election for Certain Members of Congress

Federal Employees Retirement System

Section 1. Instructions for Members

- See Privacy Act Information on page 2 of this form.
- Read information on pages 3 and 4 of this form.
- Make your election in Section 3.
- Sign in Section 5.

- If you elect FERS, any CSRS designation of beneficiary (SF 2808) is cancelled. If you want to make a new designation of beneficiary, use SF 3102.

Section 2. Identifying Information *(type or print)*

Name *(Last, first, middle)*	Date of birth *(mo, dy, yr)*	Social Security Number

Section 3. Election of Retirement Coverage

Place your initials in one of the boxes below to indicate your choice of retirement coverage. (Initial only one box.)

A. Election of FERS –
This election is available to all eligible Members.

☐ I elect FERS coverage. I understand that I will continue to be covered under Social Security. I authorize that withholdings be made from my pay for both FERS and Social Security purposes. I understand that this decision is irrevocable. (If you initial this box, you must also complete Section 4.)

B. Election of CSRS Offset –
This election is available to all eligible Members.

☐ I elect CSRS Offset coverage. I understand that I will continue to be covered under Social Security. I authorize that withholdings be made from my pay for both CSRS Offset and Social Security coverage (8% of pay).

C. Election of Full CSRS –
This election is available only to those Members who now have full CSRS.

☐ I previously elected full CSRS coverage and I want that election to stand. I understand that I will continue to be covered by Social Security. I authorize that withholdings be made from my pay for full CSRS coverage (8% of pay) and Social Security coverage (in 1987, 5.7% of pay up to $43,800).

D. Election of No Retirement Coverage –
This election is available only to those Members who have no CSRS coverage because of their previous election.

☐ I previously elected to have no retirement coverage in addition to my Social Security coverage, and I now want that election to stand. I understand that I cannot participate in the Thrift Savings Plan.

Section 4. Former Spouse Information

If you initialed box A above, you must complete this Section.
If you initialed box B, C, or D above, skip to Section 5.

Do you have a living former spouse who has not remarried before reaching age 55 to whom a court order, on file at OPM, awards a portion of your annuity or survivor benefits based on your Federal service?

☐ Yes ——→ Attach OPM Form 1556, Former Spouse's Consent to FERS Election, your request for waiver of consent requirement, or your request for extension of election deadline in order to modify court order.

☐ No

☐ I don't know if a court order is on file at OPM. I have attached OPM Form 1560 requesting OPM to determine whether a qualified court order is on file.

Section 5. Employee's Certification

I hereby certify that all statements made on this election are true to the best of my knowledge.

Signature	Date

Warning: Any intentional false statement in this election or willful misrepresentation relative thereto is a violation of the law punishable by a fine of not more than $10,000 or imprisonment of not more than 5 years or both. (18 USC 1001)

For Servicing Office Use Only	Date of receipt by agency

Privacy Act Statement

olicitation of this information is authorized by the Federal Employees' Retirement System Act (Public Law 99-335). The information you furnish will be used to identify records properly ssociated with your election, to obtain additional information if ..ecessary, to determine and allow present or future benefits, and to maintain a unique identifiable claim file. The information ay be shared with national, state, local, or other charitable or ocial security administrative agencies in order to determine enefits under their programs, to obtain information necessary under this program, or to report income for tax purposes. It may also be shared with law enforcement agencies when they are investigating a violation or potential violation of the civil or criminal law. Executive Order 9397 (November 22, 1943) authorizes use of the social security number. Furnishing the social security number, as well as other data, is voluntary but failure to do so may delay or make it impossible for us to determine your eligibility to receive benefits.

81

Information for Members of Congress

Who is eligible to make the election described on this form?

You are eligible to make the election described on this form if you are a Member of Congress (including Vice President, Delegate, and Resident Commissioner) and if:

- Beginning January 1, 1984, you were mandatorily* covered by Social Security, AND
- You had an opportunity to make retirement elections in December 1983 and September 1984, AND
- You have continued as a Member of Congress since December 31, 1983, without more than a one-year break in service, AND
- You continue to be a Member on the effective date of your election.

* In making your decision about retirement coverage, you should note that the "Windfall Elimination Provision" described on page 45 of the *FERS Transfer Handbook* does not apply to the Social Security benefits of individuals who were mandatorily covered by Social Security.

What choices are available?

The coverage you now have will continue unless you elect to transfer (1) to the Federal Employees Retirement System (FERS), or (2) to the CSRS Offset provisions, if you are not already under them. Only those Members who are already covered under the full civil service retirement provisions may elect to continue full CSRS coverage. Only those Members who previously elected to have no retirement coverage other than Social Security may continue to have no additional retirement coverage.

You may make your election of retirement coverage during the period from July 1, 1987, through December 31, 1987. If you do not make an election by December 31, 1987, you will keep your current coverage just as if you had affirmatively elected it during this period. If you currently have no retirement coverage other than social security, you may elect coverage under CSRS Offset in the future, so long as you have not previously elected FERS coverage.

Effect of later events on your retirement coverage

The retirement coverage you elect at this time will continue throughout your Federal career unless some very specific events occur. If you elect FERS coverage, that coverage will continue during all future service as a Member or Federal employee unless the service is excluded from FERS coverage (such as a temporary appointment of less than a year).

If you do not elect FERS coverage now, you may have the opportunity to do so in the future if you have a break in service of at least 4 days.

If you elect CSRS Offset coverage, that coverage will continue during all future service as a Member or Federal employee that is not excluded from CSRS coverage (such as an indefinite appointment) or Social Security coverage. If you were to become employed in a career position less than one year after leaving Congress, your Social Security would stop and you would have full CSRS coverage. If you are again employed in a position subject to Social Security coverage, your CSRS Offset coverage would resume.

If you elect full CSRS coverage, that coverage continues during any future service that is not excluded from CSRS. However, if you move to a career appointment without a one year break in service, your Social Security coverage will stop.

If you elect to have no retirement coverage other than Social Security, you may elect CSRS Offset later. You may not obtain FERS coverage so long as you are continuously a Member of Congress.

What is FERS?

- FERS is the new retirement system for Federal employees established by the Federal Employees' Retirement System (FERS) Act of 1986. FERS has three parts: the basic benefit, social security, and the savings plan.
- The Congressional Research Service has prepared information tailored for Members of Congress. It is available through your servicing office.
- The *FERS Transfer Handbook* (available through your servicing office) is also a source of information about FERS.
- Consider your decision carefully - an election of FERS coverage is irrevocable.

What is "full" CSRS coverage?

"Full" CSRS is the old Civil Service Retirement System. If you previously elected to retain full CSRS coverage (at 8% of pay) you may choose to continue to retain it. You would continue to pay the full CSRS withholding rate (in addition to Social Security), and when you retire, you would receive full CSRS benefits without the "offset" described below. The *FERS Transfer Handbook* also provides information about CSRS coverage.

What is CSRS "Offset" coverage?

Under the offset provisions, a Member is covered under CSRS and Social Security. The CSRS withholdings are offset by the amount of the Social Security Old Age, Survivors, and Disability withholdings. At retirement, the civil service retirement benefit is reduced by the amount of the Social Security benefit the person is entitled to that is attributable to the post-1983 service. The offset is made when the basic requirements for Social Security are met (usually at age 62). See "CSRS Offset Employees" on page 57 of the *FERS Transfer Handbook* for more information about this type of coverage.

BEST AVAILABLE COPY

Condition for making a FERS election

Your spouse's consent is not needed to elect FERS coverage. However, if a qualifying court order is on file at the Office of Personnel Management and it grants either a portion of your future CSRS annuity or a CSRS survivor benefit to a former spouse, you cannot elect FERS unless that former spouse consents to the election. OPM can grant you an extension of time to make your election if you need extra time to obtain a modification of the court order so that your former spouse will consent to your election or so that consent is not required (that is, by eliminating any right of your former spouse to your future retirement benefit and/or a survivor benefit). You may also request a waiver of the consent requirement if you can't locate your former spouse. If you need to request an extension of time or a waiver of the consent requirement, ask your servicing office how your request should be submitted.

Although few individuals have their retirement benefits affected by court orders, it is important that you answer Section 4 accurately. If you are unsure, mark the "I don't know..." box. If you answer "No" and OPM later finds that a court order was on file with OPM on the date of your election and your former spouse does not consent to your election, your election of FERS coverage will be void.

When coverage begins

Generally, your election is effective on the first day of the month after it is received by your servicing office. However, special rules apply if you elect FERS coverage and there is a court order on file at OPM as described earlier and your former spouse does not consent to your election or you ask OPM to determine whether or not it has such a court order on file.

If you ask for a waiver of the consent requirement and OPM grants it, your election will be effective the first day of the month after OPM notifies your servicing office that it has granted your request. If you ask for OPM to determine if there is a court order on file and OPM finds that there is no court order on file, your election will be effective on the first day of the month after OPM notifies your servicing office that it has no such court order.

Deductions

Deductions for FERS coverage for 1987 are 1.8 % of pay for FERS basic benefits and 5.7 % of pay up to $43,800 for the Old Age, Survivors, and Disability programs of Social Security. In case of CSRS offset coverage, the total deductions for CSRS offset and Social Security coverages equal the amount that would be withheld for full CSRS.

Crediting of service if you change coverage (See the special section of the *FERS Transfer Handbook* beginning on page 61 for details.)

- If you elect FERS coverage, your service after 1983 (which was subject to the special rules for certain Members and senior officials) will be credited under FERS rules. Credit for your additional civilian service depends on how much additional service you had. If it totals less than 5 years, it will be credited under FERS rules. If it totals 5 or more years it will be credited under CSRS rules.

- If you elect CSRS Offset, your service after 1983 (which was subject to the special rules for certain Members and senior officials) will be subject to CSRS Offset rules. Your additional civilian service will remain subject to the regular CSRS rules.

- If you elect either FERS or CSRS Offset and you paid full CSRS deductions (8%) for service that will be credited under FERS or CSRS Offset rules, you can apply for a return of the excess deductions.

- If you are not now covered under CSRS at all and you elect either FERS or CSRS offset coverage, you will be able to make a deposit in order to get credit for your service from January 1, 1984, until the effective date of your change to FERS or CSRS offset coverage.

See the *FERS Transfer Handbook* for more information about service credit under FERS and CSRS, including when deposits are required to get credit for service and whether refunds of prior deductions may be redeposited.

The Thrift Savings Plan

The Thrift Savings Plan (TSP) is available to Members who are covered by either FERS or CSRS. (If you choose not to be covered under either retirement system you cannot participate in the TSP.) The booklet ***Thrift Savings Plan*** (available through your servicing office) is the best source of information about TSP. See also "Thrift Savings Plan Nondiscrimination Test for High-Salaried Employees" on page 51 of the ***FERS Transfer Handbook***.

If you elect FERS coverage, the government contributes an amount equal to 1% of your pay to your TSP account each pay period. You have 30 days after the effective date of your FERS election to:

(1) elect to contribute to the Thrift Savings Plan if you are not now contributing, or

(2) change your contributions to the Thrift Savings Plan if you are already participating.

This opportunity is separate from the regular Thrift Savings Plan open seasons, which are held at least twice each year.

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, JR., JUDGE DUDLEY H. BOWEN, JR., et al., Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant.

DECLARATION OF DUDLEY H. BOWEN, JR.

DUDLEY H. BOWEN, JR., deposes and says:

1. I was appointed by President Carter, with the advice and consent of the United States Senate, as an Article III judge on November 27, 1979. I was sworn in December 5, 1979, and have served continuously until the present as a United States District Judge for the Southern District of Georgia.

2. I have personal knowledge of the facts set forth in this Declaration.

3. When I considered accepting my appointment as an Article III judge, I weighed carefully the financial consequences. I considered the salary of the office, as reduced by income tax and other deductions, my previously vested retirement benefits and the provisions for judicial retirement, which entailed no salary deduction. When I examined the financial aspects of the appointment, I made the specific inquiry to the Social Security Office and received confirmation that I had already made social security contributions for over forty quarters. Thus, I was assured that my social security entitlements were vested. I retained written evidence of my inquiry and the response from the Social Security Office prior to my appointment. I was aware of the Quadrennial Commission and provisions for increases in judicial compensation. I understood that my appointment

was for life during good behavior and that the Constitution guaranteed that my compensation would not be diminished. Taking these factors into account, I determined that the compensation of the office was acceptable.

4. At the time I accepted my appointment, no deductions were made from my salary for retirement. The salary of my office was not subject to deductions for social security, and my service as a judge was not to be credited toward social security benefits. The only mandatory deductions from my salary were for federal and state income tax. In addition, I elected a deduction for health insurance. I subsequently elected an additional deduction by enrolling in the Thrift Savings Plan.

5. Since January 1, 1984, my service as an Article III judge has been subject to dual retirement coverage. I am subject to both the statutory retirement provisions for Article III judges and social security. Before the January 1, 1984, social security deductions began, I wrote to the Director of the Administrative Office on December 22, 1983. A copy of that letter is appended hereto. My purpose in December of 1983 was to protest the deduction of social security contributions which diminished my compensation while in office. In response thereto, I received the letter of the general counsel for the Administrative Office of the United States Courts dated December 28, 1983, also appended hereto. Moreover, having been determined to be an active judge fully insured as of 12/31/82, I enclose herewith a page of a questionnaire which I returned to the Administrative Office of the United States Courts expressing my views on the matter.

6. I have never had an opportunity to elect a retirement system to cover my federal judicial service pursuant to the Federal Employees' Retirement System Act or any other statute.

7. I have never been provided with the right to elect an offset that would reduce the amount or economic burden of

my Social Security deductions pursuant to the Federal Employees' Retirement Contribution Temporary Adjustment Act or any subsequent statute.

8. In 1984, my compensation was reduced by $2,532.60 in social security deductions.

9. In 1985, my compensation was reduced by $2,791.80 in social security deductions.

10. In 1986, my compensation was reduced by $3,003.00 in social security deductions.

11. In 1987, my compensation was reduced by $3,131.70 in social security deductions.

12. In 1988, my compensation was reduced by $3,379.50 in social security deductions.

13. In 1989, my compensation was reduced by $3,604.80 in social security deductions.

14. In 1990, my compensation was reduced by $3,924.45 in social security deductions.

15. In 1991, my compensation was reduced by $5,123.30 in social security deductions.

16. In 1992, my compensation was reduced by $5,313.44 in social security deductions.

17. Through April 30, 1993, my 1993 compensation has been reduced by $4,232.36 in social security deductions.

18. I filed a request for refund with the Internal Revenue Service for my social security deductions for the 1987, 1988, 1989 and 1990. This refund request was years denied by the IRS on April 19, 1991.

19. Pursuant to 28 U.S.C.§1746, I declare under penalty of perjury that the foregoing is true and correct.

/s/ DUDLEY H. BOWEN, JR.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF GEORGIA

DUDLEY H. BOWEN, JR. JUDGE

December 22, 1983

Mr. William E. Foley
Director
Administrative Office of the
United States Courts
Washington, D.C. 20544

Dear Mr. Foley:

Please let me extend to you and your staff my best wishes for a very happy 1984.

On another note, please accept this letter as my formal and strong protest against the deduction of any social security tax or payment from my monthly compensation.

One very important consideration which I took into account when I decided to seek this position was the fact that I had already paid into the social security program for a period of over forty quarter years. Thus, I had already become entitled to social security payments.

Now, I am an Article III constitutional judge, and my compensation is about to be diminished while I am in office. Social security deductions will, in effect, require me to pay twice for an entitlement that I already own, much of which I will probably never receive.

Any social security deduction is unconstitutional.

With kindest regards, I remain

Sincerely,

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON, D.C. 20544

WILLIAM E. FOLEY
DIRECTOR
JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

WILLIAM M. NICHOLS
GENERAL COUNSEL

December 28, 1983

Honorable Dudley H. Bowen, Jr.
United States District Court
Post Office Box 2106
Augusta, Georgia 30903

Dear Judge Bowen:

Mr. Foley has asked me to acknowledge your correspondence of December 22, 1983, protesting the deduction from your judicial salary of Social Security taxes under the Federal Insurance Contributions Act, effective on January 1, 1984.

I can assure you that this protest has been duly noted here in the Administrative Office and that your letter will be preserved in our official personnel files in the event that it may assume future legal significance.

I certainly respect your position that the imposition of FICA taxes upon the salary of judges of the United States represents an unconstitutional diminution of your compensation. I trust that you also understand the situation in which we find ourselves, namely that section 101 of the Social Security Amendments of 1983 plainly expresses the legislative intent of Congress to bring justices and judges immediately within the coverage of the Social Security system as of the effective date of this Act. We do not deem that the Director is free to dis-regard this statutory direction, no matter how persuasive may be the legal theories that would support such action, in the absence of

corrective Congressional action or a judicial decision invalidating this aspect of the 1983 Amendments.

Thank you for your letter, and we shall follow with interest the course of any future legislative or judicial developments bearing upon this important issue.

Sincerely,

William M. Nichols
General Counsel

cc: R. Glenn Johnson

Bowen, Dudley, H

Active Judges Fully Insured a/o 12/31/82

1. Your social security earnings statement furnished by the Social Security Administration indicates that you were fully insured as of December 31, 1982. This means that, without any further coverage under the system, you are or will be entitled to retirement benefits of $405 per month at age 65; and if you then have a spouse age 62 or over, a spousal benefit.* If the spouse is then at least 65, the spousal benefit is approximately one-half your benefit amount (ranging down to 37.5 percent at 62).

2. Upon your death, a spouse age 65 or above who survives you would be entitled to your benefit amount. A surviving spouse under 65 but at least 60 would be entitled to a lesser amount (ranging down to 71.5 percent at 60).

3. If you remain in an active status for the remainder of 1984, you will pay $2,533 in FICA taxes, and your monthly retirement benefit will increase by approximately $ 30.*

4. Under current law you will continue to pay FICA taxes, which will increase your eventual retirement benefits, in each year you remain in an active status or, beginning in 1986 perform substantial judicial service as a senior judge. For each year of such service, the costs, and the increases in benefits, to you would increase marginally over those shown in paragraph 3.

Appointed Dec. 5, 1979 at age 38

---

*The judicial salary of a judge in active service is considered "earnings" for social security purposes, and would preclude the payment of retirement benefits to the judge (and spousal benefits to the spouse) during any month in which the judge is in an active status and has not reached age 70. Under current law, and beginning January 1, 1986, senior judges are treated similarly with respect to "earnings" attributable to periods during which they perform judicial service.

One of the reasons I took a judicial appointment was that I was assured there would be no further contributions to Social Security. I already had 40 quarters of coverage (contributions). I requested and obtained a certificate to that effect. D.H. Bowen, Jr.

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

UNITED STATES, Defendant.

DECLARATION OF A.J. McNAMARA

A.J. MCNAMARA deposes and says:

1. I was appointed by President Reagan, with the advice and consent of the United States Senate, as an Article III judge on June 21, 1982. I was sworn-in shortly thereafter and have served continuously until the present as a United States District Judge for the Eastern District of Louisiana.

2. I have personal knowledge of the facts set forth in this Declaration.

3. When I considered accepting my appointment as an Article III judge, I weighed carefully the financial consequences. I considered the salary of the office, as reduced by income tax and other deductions, my previously vested retirement benefits and the provisions for judicial retirement, which entailed no salary deduction. At the time, I had four children in high school and college and I was concerned about paying for their higher education. I knew I was taking a substantial pay cut in becoming a judge and it was important to my weighing of the financial consequences that there would be no deduction from my salary for Social Security. I was aware of the Quadrennial Commission and provisions for increases in judicial compensation. I understood that my appointment was for life during good behavior and that the Constitution guaranteed that my compensation would not be diminished. Taking these factors into account, I determined that the compensation of the office was acceptable.

4. At the time I accepted my appointment, no deductions were made from my salary for retirement. The salary of my office was not subject to deductions for Social Security and my service as a judge was not to be credited toward Social Security benefits. The only mandatory deductions from my salary were for federal and state income tax. In addition, I elected deductions for health insurance and life insurance. I enrolled in the Judicial Survivors' Annuity System in January 1993.

5. Since January 1, 1984, my service as an Article III judge has been subject to dual retirement coverage. I am subject to both the statutory retirement provisions for Article III judges and Social Security.

6. I have never had an opportunity to elect a retirement system to cover my federal judicial service pursuant to the Federal Employees' Retirement System Act or any other statute.

7. I have never been provided with the right to elect an offset that would reduce the amount or economic burden of my Social Security deductions pursuant to the Federal Employees' Retirement Contribution Temporary Adjustment Act or any subsequent statute.

8. In 1984, my compensation was reduced by $2,532.60 in Social Security deductions.

9. In 1985, my compensation was reduced by $2,791.80 in Social Security deductions.

10. In 1986, my compensation was reduced by $3,003.00 in Social Security deductions.

11. In 1987, my compensation was reduced by $3,131.70 in Social Security deductions.

12. In 1988, my compensation was reduced by $3,379.50 in Social Security deductions.

13. In 1989, my compensation was reduced by $3,604.80 in Social Security deductions.

14. In 1990, my compensation was reduced by $3,924.45 in Social Security deductions.

15. In 1991, my compensation was reduced by $5,123.30 in Social Security deductions.

16. In 1992, my compensation was reduced by $5,313.44 in Social Security deductions.

17. Through April 30, 1993, my 1993 compensation has been reduced by $4,232.36 in Social Security deductions.

18. I filed a request for refund with the Internal Revenue service for my social security deductions for the years 1987, 1988, 1989 and 1990. This refund request was denied by the IRS on April 8, 1991.

19. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: May 17, 1993 /s/ A.J. McNamara

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

UNITED STATES, Defendant.

DECLARATION OF HENRY A. MENTZ, JR.

HENRY A. MENTZ, JR. deposes and says:

1. I was appointed by President Reagan, with the advice and consent of the United States Senate, as an Article III judge on June 25, 1982. I was sworn-in shortly thereafter and have served continuously until the present as a United States District Judge for the Eastern District of Louisiana.

2. I have personal knowledge of the facts set forth in this Declaration.

3. When I considered accepting my appointment as an Article III judge, I weighed carefully the financial consequences. I considered the salary of the office,, as reduced by income tax and other deductions, my previously vested retirement benefits and the provisions for judicial retirement, which entailed no salary deduction. Before accepting my appointment, I discussed these financial consequences with my accountant and we agreed that one of the factors making a judicial appointment attractive was that no deductions would be made from my salary for Social Security. I was aware of the Quadrennial Commission and provisions for increases in judicial compensation. I understood that my appointment was for life during good behavior and that the Constitution guaranteed that my compensation would not be diminished. Taking these factors into account, I determined that the compensation of the office was acceptable.

4. At the time I accepted my appointment, no deductions were made from my salary for retirement. The salary of my office was not subject to deductions for Social Security and my service as a judge was not to be credited toward Social Security benefits. The only mandatory deductions from my salary were for federal and state income tax. In addition, I elected deductions for health insurance and life insurance. I also enrolled in the Judicial Survivors' Annuity System in December, 1992.

5. Since January 1, 1984, my service as an Article III judge has been subject to dual retirement coverage. I am subject to both the statutory retirement provisions for Article III judges and Social Security.

6. I have never had an opportunity to elect a retirement system to cover my federal judicial service pursuant to the Federal Employees' Retirement System Act or any other statute.

7. I have never been provided with the right to elect an offset that would reduce the amount or economic burden of my Social Security deductions pursuant to the Federal Employees Retirement Contribution Temporary Adjustment Act or any subsequent statute.

8. In 1984, my compensation was reduced by $2,532.60 in Social Security deductions.

9. In 1985, my compensation was reduced by $2,791.80 in Social Security deductions.

10. In 1986, my compensation was reduced by $3,003.00 in Social Security deductions.

11. In 1987, my compensation was reduced by $3,131.70 in Social Security deductions.

12. In 1988, my compensation was reduced by $3,379.50 in Social Security deductions.

13. In 1989, my compensation was reduced by $3,604.80 in Social Security deductions.

14. In 1990, my compensation was reduced by $3,924.45 in Social Security deductions.

15. On November 10, 1990, I became 70 years old and my compensation was no longer reduced by Social Security deductions. At that time, I began receiving Social Security benefits.

16. I filed a request for refund with the Internal Revenue Service for my Social Security deductions for the years 1987, 1988, 1989 and 1990. This refund request was denied by the IRS on April 8, 1991.

17. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 18, 1993 /s/ HENRY A.J. MENTZ, JR.

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

UNITED STATES, Defendant.

DECLARATION OF MICHAEL M. MIHM

MICHAEL M. MIHM deposes and says:

1. I was appointed by President Reagan, with the advice and consent of the United States Senate, as an Article III judge on August 5, 1982. I was sworn-in shortly thereafter and have served continuously until the present as a United States District Judge for the Central District of Illinois.

2. I have personal knowledge of the facts set forth in this Declaration.

3. When I considered accepting my appointment as an Article III judge, I weighed carefully the financial consequences. I considered the salary of the office, as reduced by income tax and other deductions, my previously vested retirement benefits and the provisions for judicial retirement, which entailed no salary deduction. The financial consequences of accepting a judicial appointment were especially important to me and my family because I had spent my career as a lawyer in the public service, rather than in private practice. I was also concerned about paying for the college education of my four children on a judge's salary. Before accepting the appointment, my wife and I sat down at our kitchen table and discussed these financial circumstances, including the fact that I would not have amounts deducted from my pay for Social security. I was aware of the Quadrennial Commission and provisions for increases in judicial compensation. I understood that my appointment was for life during good behavior and that the

constitution guaranteed that my compensation would not be diminished. Taking these factors into account, I determined that the compensation of the office was acceptable. I am not saying that I would not have become a federal judge if social security was being deducted at the time I went on the bench. I am saying that because we had (and have) 4 children to educate, and no accumulated wealth, the fact that social security payments would not be deducted was a specific factor discussed by my wife and I regarding whether I could financially afford to support and educate my family on the salary provided.

4. At the time I accepted my appointment, no deductions were made from my salary for retirement. The salary of my office was not subject to deductions for social Security and my service as a judge was not to be credited toward Social security benefits. The only mandatory deductions from my salary were for federal and state income tax. In addition, I elected health insurance and life insurance. I also elected deductions for the Thrift Savings Plan beginning in January, 1993.

5. Since January 1, 1984, my service as an Article III judge has been subject to dual retirement coverage. I am subject to both the statutory retirement provisions for Article III judges and Social Security.

6. I have never had an opportunity to elect a retirement system to cover my federal judicial service pursuant to the Federal Employees' Retirement System Act or any other statute.

7. I have never been provided with the right to elect an offset that would reduce the amount or economic burden of my Social Security deductions pursuant to the Federal Employees' Retirement Contribution Temporary Adjustment Act or any subsequent statute.

8. In 1984, my compensation was reduced by $2,532.60 in Social Security deductions.

9. In 1985, my compensation was reduced by $2,791.80 in Social Security deductions.

10. In 1986, my compensation was reduced by $3,003.00 in Social Security deductions.

11. In 1987, my compensation was reduced by $3131.70 in Social Security deductions.

12. In 1988, my compensation was reduced by $3,379.50 in Social Security deductions.

13. In 1989, my compensation was reduced by $3,604.80 in Social Security deductions.

14. In 1990, my compensation was reduced by $3,924.45 in Social Security deductions.

15. In 1991, my compensation was reduced by $5,123.30 in Social Security 'deductions.

16. In 1992, my compensation was reduced by $5,313.44 in Social Security deductions.

17. Through April 30, 1993, my 1993 compensation has been reduced by $4,232.36 in Social Security deductions.

18. Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Dated: June 7, 1993 /s/ Michael M. Mihm

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
WASHINGTON. D.C. 20344
December 10, 1982

WILLIAM E. FOLEY
DIRECTOR

JOSEPH F. SPANIOL, JR.
DEPUTY DIRECTOR

MEMORANDUM TO THE CHIEF JUSTICE

SUBJECT: Constitutionality of Medicare Tax as Applied to Justices and Judges

Section 278 of the Tax Equity and Fiscal Responsibility Act of 1952, Public Law No. 97-248, 96 Stat. 324, applies to Federal employment the coverage of medicare and the consequent "hospital insurance tax" as of January 1, 1983. It effects this purpose by amendments to the Social Security Act and the Federal Insurance Contributions Act (FICA). Section 3101 (b) of the latter Act (26 U.S.C. § 3101 (b)) is the source of the hospital insurance tax, imposing "on the income of every individual a tax equal to the following percentages of the wages... received by him with respect to employment...."

It seems apparent from this statutory scheme that the medicare hospital insurance tax is basically an income tax. This tax is a part of the mechanism to finance the Social Security system. In the early days of the Social Security Act, the Supreme Court described its Title VIII as laying "a special income tax upon employees to be deducted from their wages and paid by the employers." *Helvering v. Davis*, 301 U.S. 619, 634 (1937). More recently it has been reaffirmed that section 3101 of FICA "imposes both an income tax on individuals with respect to their employment and an excise tax on employers. . . ." *Avis Rent-A-Car System, Inc. v. United States*, 364 F. Supp. 605, 608 (E.D. N.Y. 1973), *rev'd on other grounds*, 503 F.2d 423 (2nd Cir, 1974).

Given the essential character of this medicare tax as an income tax, its application to the Judiciary appears consistent with precedent respecting the amenability to income taxation of the salaries of judges appointed under Article III. In *O'Malley v. Woodrough*, 307 U.S. 277 (1939), it was held that the imposition upon judicial income of a non-discriminatory tax laid generally on net income is not an unconstitutional diminution of Federal judicial salaries and that Article III, sec. 1, does not create a judicial immunity from the incidence of such taxation. 307 U.S. at 282. *Accord, United States v. Will*, 449 U.S. 200, 227 n.31 (1980).

/s/ William E. Foley

January 1985

FEDERAL JUDGES AND SOCIAL SECURITY
A REPORT

Administrative Office
of the
United States Courts

Background

Public Law No. 98-21, the Social Security Amendments of 1983, was enacted against a background of extended public debate over the means of addressing a funding crisis in social security programs providing retirement and disability benefits to workers and their survivors. The debate examined divergent views concerning an estimated funding shortfall, and the wisdom of remedies consisting of reductions in benefits and increases in revenues. While remedial congres-sional action was acknowledged to be imperative, it was also recognized to be complex and difficult.

In January 1983, the bipartisan National Commission on Social Security Reform (Greenspan Commission) agreed to a comprehensive, delicately-balanced set of proposals, embodying a compromise solution to the congressional impasse. The Commission's recommen-dations served as a catalyst for legislative action and became the blueprint for the Social Security Amendments of 1983.

Confronted with the prospect that social security payments would be suspended within a matter of weeks, and recognizing that the package proposed by the Greenspan Commission would probably unravel if too many of its compromise elements were rejected, Congress placed the Commission proposals on a fast legislative track. As a results the 1983 amendments were enacted within two months, an unprecedented feat for legislation having universal impact and promising potential controversy. The enacted bill contained substantially all of the Commission's proposals. In addition, several new provisions were added during the brief period of congressional consideration. Apparently unintended consequences of two of the added provisions necessitate this report.

Social Security and Federal Employees

The Greenspan Commission proposed that new Federal employees be covered under the social security system. Congress adopted that recommendation for employees entering the Federal work force on and after January 1, 1984. The obvious justification for this extension of coverage was that of providing an immediate and substantial increase in social security revenues from a group for whom payment of benefits would not materialize for many years.

The House Ways and Means Committee approved a bill (H.R. 1900) which *further* extended social security coverage, effective January 19 1984, to small groups of *incumbent* Federal officials and employees. Included were the President, Vice President, Members of Congress, presidential and other political appointees in the Executive Branch, and justices, judges and magistrates in the Judicial Branch. The rationale for including these officials in that manner is unclear. The Greenspan Commission had not proposed that *incumbent* officials and employees be brought under social security. The total number of such individuals affected by H.R. 1900 was realistically too small for their inclusion to have a substantial Impact on system revenues. The rationale for folding a relative handful of incumbent executive, legislative and judicial officials into social security can perhaps best be gleaned from the testimony of House Majority Leader Jim Wright before the Ways and Means Committee; Mr. Wright there stated that inclusion of all members of Congress would be a "symbolic" gesture of commitment to keeping the social security system solvent.

Social Security and Senior Judges

During its consideration of the provision placing a limited number of incumbents under social security, the Ways and Means Committee adopted an amendment offered by

Congressman Henson Moore which further extended social security coverage to *retired* justices and Judges during periods in which they render judicial service pursuant to 28 U.S.C. § 294. Such judges are designated in 28 U.S.C. § 294(b) and throughout this report as "senior judges." The term is not used here to include those few judges who retire from their offices pursuant to 28 U.S.C. § 371(a), but only those who "retire from regular active service" pursuant to 28 U.S.C. § 371(b).

The Moore amendment, on its face, was premised upon a degree of logic. Ordinarily, retirees who return to work even temporarily, are subject to social security taxation. Wages they earn may disqualify them from receiving social security benefits for which they are otherwise eligible. Extension of this logical concept to justices and judges, however, overlooked the constitutional provision governing judicial compensation and an established tradition of continued service by "retired" (or senior) judges. That oversight has created a serious threat to the continued efficient and economical functioning of the judicial system.

The Judicial Retirement System

Judges are eligible for retirement under the following age and service criteria:

Attained age:	Years of service:
65	15
66	14
67	13
68	12
69	11
70	10

A judge who meets the above criteria may *either*: (a) retire from judicial office, in which case he will continue to receive the salary of the office payable at the time of his retirement; or (b) retain the office but retire from active service, in which case he

will continue to receive the salary of the office. A judge who chooses the latter option becomes a "senior" judge and may, with his consent, be designated to perform further judicial service. In the past two decades nearly 90 percent of the judges electing "senior status retirement" have continued to render substantial judicial service. In the year ending June 30, 1984, senior judges made contributions equivalent to that of 21 active circuit judges and 52 active district judges, as shown in Table 1.

Another form of voluntary service significant in the effective functioning of the judicial system is that rendered by judges who continue in active service beyond their retirement eligibility dates. At the end of 1980, 47 active judges were eligible to retire. Twenty-one of them are still in active service, and the twenty-six who chose to retire had provided an average of over five years of active service beyond their retirement eligibility dates. Traditionally, many judges have chosen to remain in active status, health permitting, even though retirement would provide them with a greater degree of control over their workloads and relief from administrative burdens of court management.

The Legislative Aftermath

Soon after the enactment of the 1983 social security amendments Congress perceived the need to address two Federal employee-related problems created by that landmark legislation.

Coverage of Retired Judges. First, there was the serious adverse potential of Section 101(c) of the Social Security Amendments, which, as explained *supra*, extended social security coverage to *senior* judges who voluntarily perform judicial service.

In the late spring and summer of 1993, there was a growing recognition within and without Government circles that, since senior Federal judges are entitled to their salaries whether or not they do judicial work, mandated social security coverage

for those who do choose to work amounts to a financial penalty for voluntary services. To correct this perceived inequity, several members of Congress introduced bills which would have repealed Section 101(c) of the 1983 amendments. Among them was Congressman Henson Moore, the original sponsor of that section, who commented as follows—

> Mr. Speaker, today I am introducing a bill to correct a problem which arose as a result of language In the recently enacted Social Security Amendments of 1983, Public Law 98-21.
>
> In that legislation, we provided for social security coverage, starting January 1, 1984, for Federal judges. Our intention was to insure that this group of Government officials would be covered essentially in the same way as Members of Congress and appointed officers of the executive branch. We were striving for equity, but in the process we achieved an unintended result.
>
> This result is, in effect, a penalty on senior judges, who have retired but who return to active service from time to time to help meet workload needs of the Federal judiciary. When these retired judges do return to the bench in the future, they will be required to pay social security payroll taxes. This understandably will have an adverse impact on their decision to return to active service, and we certainly did not intend that consequence when we agreed to extend social security coverage to Federal judges generally.
>
> The bill I am introducing today would correct this situation by exempting the computation of these retired, senior judges from the social security payroll tax when they do return temporarily to active service.

Cong. R., June 30, 1983, E3296.

The Executive Committee of the Judicial Conference of the United States, among others, was not so certain that social security coverage of senior judges would constitute an unmitigated disincentive to further judicial service. They reasoned that the benefits and burdens of social security coverage vary from one individual to another depending upon such factors as age, health, family situations and previously earned wage credits under the system. Accordingly, there was merit to delaying the impact of Section 101(c), as opposed to repealing it, until the effects of social security coverage on each of the more than 200 senior Judges could be determined.

The more cautious approach prevailed in the Congress and was embodied in enactment on October 11, 1983, of the Federal Supplemental Compensation Act of 1982 Extension. Sec. 4, Pub. L. No. 98-118. That section postponed coverage of senior judges until January 1, 1986. The two-year postponement afforded time for study of the probable effects of social security coverage upon judicial service rendered by senior judges. That study has been completed and the results are set forth in this report.

Double Deductions. The second problem stemming from the 1983 amendments which drew congressional attention was the heavy payroll deduction burden imposed upon all new Federal employees and those incumbent officers and employees who had been folded into the social security system. Social security coverage meant that these individuals would contribute FICA taxes (6.7% of the social security base in 1984, increasing by increments to 7.65% in 1990[1]) in addition to the required 7% contribution (8% for members of

[1] Figures include the Medicare segment of FICA, 1.3% in 1984. This portion of the FICA tax was imposed upon all Federal employees by the Tax Equity and Fiscal Responsibility Act of 1982. Medicare coverage is not discussed in this report.

Congress and some others) to the civil service retirement system. Further, social security benefits overlapped to some extent civil service retirement benefits.

The double deduction problem was addressed by Congress in the Federal Employees Retirement Contribution Temporary Adjustment Act of 1983, Title II, Public Law No. 98-168. With respect to new Federal employees, the civil service contribution rate was reduced to 1.3% during 1984 and 1985 to allow Congress time to enact a new civil service retirement system. With respect to incumbent employees, the problem was more complex because many of them had a substantial investment in civil service retirement and, presumably, in estate plans which did not anticipate social security coverage. In order to afford these individuals some flexibility in adjusting to the 1983 amendments pending enactment of a new civil service retirement system, Congress provided three options. The affected employees could: (1) terminate their civil service retirement participation and obtain a refund of past contributions, (2) continue participation in the civil service system at the regular contribution rates, or (3) continue participation in the civil service system at the reduced contribution rate applicable to new employees (1.3%). Under the latter option civil service retirement credit for service at the reduced contribution rate is allowed only if the employee deposits the difference between the normal contribution rate and 1.3%.

The Retirement Contribution Temporary Adjustment Act provided a measure of relief for almost all of the groups of incumbent officers and employees who were folded into social security coverage by the 1983 amendments, including magistrates, bankruptcy judges and other judges serving under term appointments. Justices and judges appointed pursuant to Article III of the Constitution for life were not affected, however, because they are not members of the civil

service retirement system and do not make contributions to it.[2]

Impact of Social Security—
Cost and Benefit Analysis

Methodology. Early in 1984 the Administrative Office of the United States Courts asked each Article III judge who held office on April 20, 1983, to authorize the Social Security Administration (SSA) to provide to the Administrative Office his or her social security earnings history for the years 1951-1982. These are the years for which SSA maintains automated earnings records, susceptible to prompt retrieval. Authorizations were provided by 582 judges in active service, 88% of the total, and by 196 senior judges, 92% of the total. The authorizations were submitted to the SSA, which in due course provided to the Administrative Office magnetic tapes containing the requested figures for each judge.

Printouts of the taped data were furnished to Robert J. Myers, who had been retained as a consultant by the Administrative Office to provide the requisite analysis. Mr. Myers is a former Chief Actuary and Deputy Commissioner of the Social Security Administration and also served as the Executive Director of the National Commission on Social Security Reform (the Greenspan Commission). Copies of the individual printouts were provided to each judge concerned. Upon review of the printouts, a few judges were alerted to errors in the SSA data which they were able to have corrected on the strength of documentary evidence available to them. In those cases the corrected figures were used in Mr. Myers' study.

---

[2] Many Judges do contribute 4-1/2% of their salaries to the Judicial Survivors Annuity System. 28 U.S.C. § 376. The benefits for survivors under that system also overlap social security benefits to some extent, but Congress provided no relief from that aspect of the double deduction problem. See Pub. L. No. 98-168.

Mr. Myers determined for each judge—

- whether he or she had earned enough quarters of social security coverage (as the result of pre-judicial employment) to become fully insured for benefits at retirement age and, if not, how many additional quarters would be needed;
- the approximate monthly retirement, spousal and survivor social security benefit payable at age 65 or such later age as would permit the judge to earn the necessary quarters of coverage for fully insured status; and
- the approximate annual cost in FICA taxes and the approximate increase in monthly benefits resulting from each additional year of work under the social security system after fully insured status is attained.

Previous participation in the social security system is reflected in Table 2 for senior judges and Table 3 for judges in active service. The most significant fact reflected in these tables is that, as of the end of 1982, 66% of senior judges and 95% of judges in active service had attained fully insured status. The importance of fully insured status for any worker is that, once retirement age is reached, continued work may be attended by adverse financial consequences. First, continued work at any age is subject to FICA taxation. Second, earnings from continued work may bar eligibility for social security retirement benefits because of the "earnings test." In 1985 a worker under age 65 may earn no more than $5,400 per year, and a worker between ages 65 and 70 no more than $7,320 per year, without reduction of the social security retirement benefit at the rate of a $1 reduction for each $2 of earnings above the specified amounts. As applied to judges, these provisions mean that *every* judge in active service, and *every* senior judge who performs a significant amount of judicial service on and after January 1, 1986, will pay *maximum* FICA

taxes and will *not* be eligible for *any* social security benefits otherwise payable, unless he or she has reached age 70. Since the salaries of judges are not subject to diminution so long as they hold their offices, the central question for every judge is: whether the reasonably expectable future benefits for themselves or their survivors will equal or exceed the costs to them in FICA taxes plus, in many cases, the forfeiture until age 70 of benefits previously earned.

The results of Mr. Myers' computations vividly confirm that the cost-benefit relationships of social security coverage vary widely among individual judges—and that the two-year postponement of coverage for senior judges was prudent. The wide variance among individuals can be illustrated by two sets of examples from the Myers study—

1. *Senior judges*

(a) Senior Judge V. is now 66 and is receiving a social security retirement benefit of $6,390 per year as a result of social security coverage before becoming a judge. He currently carries nearly a full case load and had planned to continue that level of work for a number of years, his health permitting. Current law, however, provides Judge V. with a strong financial incentive to relinquish his judicial role. For each year of continued service beginning in 1986 he would pay about $2,500 in FICA taxes and, until he reaches age 70, forfeit at least $6,390 in earned benefits. Each year of such continued service would, of course, result in an enhancement of Judge V.'s eventual social security retirement benefit. In his case, however, continued judicial service in 1986 would cost him about $9,000 and the resultant enhancement in his social security benefit would only amount to about $600 per year. It is not surprising that Judge V. has indicated that, unless the current law is amended, he will perform no judicial service after 1985.

(b) Senior Judge B. is now 65 and had limited social security coverage prior to his judicial appointment. He needs 16 additional quarters of social security participation to acquire fully Insured status. Under current law four years of continued judicial service beginning in 1986 would give him the necessary coverage by the end of 1989, when he will have reached age 70. He would then be eligible for a social security retirement benefit of about $5,000 per year. The "cost" would consist of the FICA taxes paid in the years 1986-1989, or about $10,000. Assuming that Judge B. is in reasonably good health, additional social security coverage is an actuarially sound "'investment" and he will have an incentive to continue his voluntary performance of judicial service.

2. *Judges in active service*

(a) District Judge L. is now 61 and worked under social security coverage for more than thirty years prior to his appointment to the Federal bench In 1979. At that time he was serving under a lifetime appointment in his State's judiciary. He was reluctant to accept the Federal appointment because the survivor benefit system provided for State judges was much more adequate than that for Federal judges and was without cost (in contrast to the 4-1/2% payroll deduction in the Federal system). The decisive element in his decision to accept the Federal appointment was the fact that the contributions he had been making to the social security system could be used to offset, in part, the new contributions required for a Federal survivor annuity and the cost of additional life insurance needed to supplement that annuity. Based on his past coverage, Judge L. will be entitled to a social security basic retirement benefit of about $7,700 at age 65 plus a spousal benefit of about one-half of that amount. He will not be eligible for senior status as a Federal judge

until 1991 at age 68. Under current law he will by that time have paid about $25,000 in additional FICA taxes but his social security retirement and survivor benefits will have increased only marginally over those already earned. Judge L. feels that his estate plans have been disrupted unfairly and is exploring the possibilities of reappointment to the State bench.

(b) Circuit Judge C. is now 68 and has served on the Federal bench for 18 years. Prior to his judicial appointment he had enough social security coverage to acquire fully insured status and would now be receiving a retirement annuity but for the "earnings test." A few years of additional participation in the social security system would appear to offer a financial advantage to Judge C. in that each such year of FICA contribution would result in a disproportionate increase of about $1,560 in his annual retirement benefit. The large increase in benefit is attributable to the facts that his pre-judicial coverage was limited in duration and that he will earn a 3% increase in benefits for each year he delays his retirement beyond the normal retirement age of 65. Under these circumstances Judge C. is motivated to postpone the retirement for which he is now eligible, at least for a few years.

(c) District Judge A. is now 57 and was appointed to the Federal bench in 1982. Prior to his appointment he had many years of social security-covered employment; in this respect he is more typical of active judges than is Circuit Judge C. in the preceding example. At age 65 Judge A. would, but for the earnings test, be entitled to a social security retirement benefit of about $8,580 per year, and his wife would be entitled to a spousal annuity of about one-half of that amount. He will be eligible to take

senior status in 1995 when he is 68. He will then have a strong financial disincentive—about $15,000 per year—to remaining in active status or performing judicial service in senior status. Understandably, Judge A. has indicated that this prospect will cause him to retire as soon as he is eligible and to perform no judicial service thereafter.

The Judicial Response

In July 1984, each judge participating in the social security study was provided the results of the Myers' analysis of his or her social security status (see pp. 11- 13, above), and was asked to complete a questionnaire designed to determine the effects of social security coverage upon Federal judicial service. Of the senior judges for whom Mr. Myers had earnings histories, 148, or 75%, responded to the questionnaire. Responses from active judges totaled 426, or 73% of those who received questionnaires. The results are reflected in Tables 4 and 5.

The questionnaire results clearly forecast a serious "judge-power" crisis for the courts beginning in late 1985 and continuing indefinitely thereafter. Over 65% of the *senior* judges will, if the current social security law remains in effect, contribute either less judicial service or no judicial service at all after 1985. Equally disturbing is the fact that more than one-half of the active judges would be motivated, under current law, to retire at the earliest date of eligibility and to perform little or no judicial service thereafter. In sum, the study establishes that *mandatory* social security coverage for those serving as judges in April of 1983 threatens to undermine a valuable tradition of voluntary service by both active and retired judges.

Not all judges found that social security coverage would serve as a disincentive to continued judicial service, however. A minority of both active and senior judges, 19% and 18%,

respectively, indicated that they would elect to remain under social security coverage if such coverage were made optional (see Tables 4 and 5). While those percentage figures are relatively small, they reflect the views of more than 100 serving judges.

The Fairness Issue

Like other incumbent officers and employees who were "folded into" the social security system by the Social Security Amendments of 1983, Federal judges in office before April 20, 1983, were the victims of a change in the rules in the middle of the game. But unlike other incumbents—judges were not afforded even the partial relief provided by the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983. (See pp. 8-10, supra.) For judges, the language of the Conference Committee report on that legislation is ironic—

> A second important modification permits current employees to make elections concerning coverage. Although the Social Security Amendments of 1983 (P.L. 98-21) generally provide that only Federal employees hired after December 31, 1983, will be covered by social security (and therefore face a double coverage situation), certain current officers and employees and current Members and judges will also be brought under social security effective January 1, 1984. Individuals in this affected group who are participants in a covered retirement system will be double covered effective January 1, 1984. The affected group includes the President and Vice President, Members of Congress, individuals in Executive Schedule positions (e.g., cabinet secretaries, deputy and assistant secretaries, heads and top officials of other agencies, boards and commissions, and other top officials), noncareer members of the Senior Executive Service and Senior Foreign Service, top officials in the White House and judges.

> Unlike newly hired employees who may elect whether or not to accept Government employment and face the uncertainties of a yet-to-be-established supplemental retirement program, the affected group has no election other than to resign (which in many instances would involve resignations from elected offices, lifetime judicial appointments, or presidentially appointed and Senate-confirmed positions). Also, unlike most newly hired employees, many in the affected group have made a substantial investment in, and have earned substantial credits under, their current covered retirement systems. For these individuals, the rules are beeing changed in the middle of the game. The conferees believe this is unfair, and the conference agreement permits certain elections by individuals in the affected group in order to mitigate the unfairness.

The unfairness which the Conference Committee thus perceived, but which the legislation did not address, is particularly acute in the case of judges. They are appointed relatively late in life,[3] usually in the full stream of successful careers. Many of them give up opportunities for much larger monetary compensation in exchange for the rewards of judicial service, compensated in a material way only by a judicial salary which continues during good behavior. Once appointed, retirement income was no longer a factor in their financial planning, but most of them found it necessary to make heavy financial commitments to provide benefits to their survivors. Those arrangements were severely impacted by the imposition of a substantial annual levy in the form of taxes imposed under the social security system, the centerpieces of which are an old-age benefit that most judges do not need and survivor benefits for which they had made other arrangements.

---

[3] In the years 1980-1984, the average age at appointment was 50.

The Social Security Amendments of 1983 raise the possibility of yet another financial penalty on voluntary judicial service. In many jurisdictions, the salaries of senior judges—like the retirement annuities of other persons—are exempt from State and municipal taxation on incomes. In the case of retired Federal judges the rationale for this exemption is that, since eligibility for salary is not conditioned upon the performance of service, the judicial salary is not earned income. The continuance of these State and local exemptions is highly unlikely in the face of a Federal law which characterizes the salary of senior judges who perform judicial service as "wages" for social security purposes.

Conclusion

For most judges, coverage under the social security system constitutes a significant financial disincentive to voluntary judicial service. Further, the sudden imposition of social security coverage upon *sitting* judges on April 20, 1983, was fundamentally unfair to most of them. Unless Congress provides remedial legislation, a substantial number of new judgeships will be needed at a cost far exceeding the FICA revenue to be derived from judges in office upon the enactment of the 1983 amendments.

To provide equity to the judges afffected, and to maximize the incentive for voluntary judicial service, Congress should provide that social security coverage is optional for senior judges and for those judges who were in active service on or before April 20, 1983.

[Note: Schedule omitted in printing]

Senior Judges

Pre-Judicial Covered Earnings

Year of Birth	*Fully Insured*	*Not Fully Insured* *Number*	*Not Fully Insured* *Average Age to Acquire Necessary Quarters of Coverage*
1893 (and earlier)	1	1	99
1895	1	1	93
1896	0	1	92
1897	3	0	—
1898	2	0	90
1899	1	3	90
1900	1	3	88
1901	3	3	88
1902	2	5	88
1903	4	4	86
1904	7	3	86
1905	4	8	84
1906	11	1	83
1907	8	4	82
1908	3	2	82
1909	7	4	81
1910	4	6	79
1911	9	6	79
1912	15	2	78
1913	13	3	76
1914	10	0	—
1915	6	1	74
1916	5	2	72
1917	5	2	70
1918	4	0	—
1919	1	1	69
Totals	130 (66%)	66 (33%)	

Active Judges

Pre-Judicial Covered Earnings

Year of Birth	*No. Fully Insured*	*Not Fully Insured*	
		Number	*Quarters Needed*
1905	1	0	—
1906	1	1	20
1909	1	0	—
1910	3	0	—
1911	1	1	24
1912	2	0	—
1913	0	1	24
1914	7	1	25
1915	7	0	—
1916	18	1	23
1917	8	0	—
1918	17	1	29
1919	16	2	8, 20
1920	36	4	6, 14, 15, 16
1921	28	2	6, 7
1922	40	2	12, 20
1923	33	2	7, 34
1924	32	0	—
1925	31	0	—
1926	23	0	—
1927	20	1	38
1928	26	0	—
1929	27	0	—
1930	21	0	—
1931	30	0	—
1932	13	2	16, 40
1933	16	0	—
1934	17	2	12,20
1935	10	0	—
1936	18	0	—
1937	10	0	—

Active Judges

Pre-Judicial Covered Earnings

Year of Birth	*No. Fully Insured*	*Not Fully Insured*	
		Number	*Quarters Needed*
1938	12	0	—
1939	4	1	20
1940	6	2	8, 36
1941	4	1	11
1942	6	0	—
1943	4	0	—
1944	2	0	—
1946	1	0	—
1948	0	1	36
1950	1	1	10
Totals	553 (95%)	29 (5%)	

Senior Judges

(1) *Judicial Service by Designation*

If, after December 31, 1985, social security coverage is extended to senior judges during periods they perform judicial service, as provided in current law, I would:

(a) render more judicial service than at present 1

(b) render about the same amount of judicial service as I do now 50

(c) render less judicial service than I do now 19

(d) render no further judicial service 78

(2) *Optional Social Security Coverage*

If social security coverage is made optional for senior judges, I:

(a) will elect to be covered 27

(b) will not elect to be covered 117

Active Judges

(1) *Optional Social Security Coverage*

If social security coverage is made optional for judges, I:

(a) will elect to be covered 81

(b) will not elect to be covered 345

(2) *Retirement Planning*

Assuming that when I reach eligibility for senior status, social security coverage extends to judges in active status and to senior judges during periods they perform judicial service pursuant to designation, such coverage would:

(a) probably cause me to retire as soon as I am eligible and to perform little or no judicial service thereafter 230

(b) probably cause me to retire as soon as I am eligible, but would not dissuade me from performing a substantial amount of judicial service 23

(c) probably cause me to postpone my retirement, or to perform substantial judicial service while in senior status in order to earn additional quarters of social security coverage 8

(d) probably not be a significant factor in my retirement decision 163

(e) has already been a factor in my retirement plans 2

UNITED STATES COURT OF FEDERAL CLAIMS

Civil Docket No. 705-89 C

JUDGE TERRY J. HATTER, et al., Plaintiffs,

v.

THE UNITED STATES OF AMERICA, Defendant.

DECLARATION OF THOMAS HORST

I, Thomas Horst, hereby declare and state as follows:

1. I am a Managing Director of the economic consulting firm of Horst, Frisch, Clowery & Finan Incorporated, 2445 M Street, NW, Suite 200, Washington, DC 20037.

2. I have personal knowledge of the facts set forth in this Declaration.

3. My firm was retained to calculate the amount of interest due on each plaintiffs' damages claim in this case.

4. I calculated the total amount of Social Security withholding for each plaintiff from copies of plaintiffs' W-2 forms for the relevant years.[1]

5. I was instructed to deem the amounts of compensation owed plaintiffs to have been paid on April 15 of the year following the year in which the social security deductions had been withheld, *e.g.*, the amounts by which plaintiffs' compensation was diminished in 1990 would be deemed paid on April 15, 1991. I was then instructed to calculate interest

[1] I have been informed by plaintiffs' counsel that Judge Terence T. Evans was elevated to the United States Court of Appeals for the Seventh Circuit on August 14, 1995. Because of the Judge's appointment to the appellate court in 1995, for that year, I was asked to calculate the amount of interest for Judge Evans based on the amount of his Social Security withholdings for the first 8 1/2 months of that year.

compounded annually at a rate indexed to the 52-week Treasury Bill, at the auction date nearest to April 15 of each year following the year in which the amounts had been withheld.[2]

6. Based on this methodology, I used the following interest rates as published by the Department of Treasury:

Year Amounts Deemed Paid	52-Week Treasury Bill Interest Rate	Date of Auction
1984	10.81%	4/12/84
1985	9.15%	4/11/85
1986	6.31%	4/10/86
1987	6.30%	4/9/87
1988	7.01%	4/7/88
1989	9.31%	4/6/89
1990	8.32%	4/5/90
1991	6.26%	4/4/91
1992	4.55%	4/2/92
1993	3.37%	4/6/93
1994	5.02%	4/28/94
1995	6.28%	4/27/95
1996	5.60%	4/25/96

7. Based upon these interest rates and the amount of each plaintiffs' Social Security withholding as evidenced by each plaintiffs' W-2 forms, I have calculated the total amount of compounded interest due each plaintiff as off January 15, 1997. The attached charts reflect my calculations. *See* Attachments 1-16.

8. Based on these calculations, each plaintiff's damages plus interest in this case are as follows:

[2] For the Social Security withholding in 1996, I was instructed to deem those payments made on January 15, 1997. Accordingly, I calculated interest at a rate equal to three-quarters of the 52-week T-bill rate on April 25, 1996, or 4.20 percent (*i.e.*, 5.60% x 3/4).

Name	Compensation	Compounded Interest	Compounded Damages
Judge Arceneaux	$36,616.34	$18,303.54	$54,919.88
Judge Baker	$44,110.63	$19,226.72	$63,337.35
Judge Beer	$42,145.90	$19,015.63	$61,161.53
Judge Bowen	$55,989.64	$19,502.13	$75,491.77
Judge Burciaga	$44,272.05	$19,244.06	$63,516.11
Judge Evans	$49,620.85	$19,479.27	$69,100.13
Judge Hatter, Jr.	$55,989.64	$19,502.13	$75,491.77
Judge McNamara	$55,989.64	$19,502.13	$75,491.77
Judge Mentz	$32,453.28	$17,594.16	$50,047.44
Judge Mihm	$55,989.64	$19,502.13	$75,491.77
Judge Owens	$46,136.88	$19,332.95	$65,469.83
Judge Pregerson	$56,415.80	$19,535.41	$75,951.21
Judge Ramirez	$19,478.06	$14,244.45	$33,722.51
Judge Roettger	$55,989.64	$19,502.13	$75,491.77
Judge Wilhoit	$55,989.64	$19,502.13	$75,491.77
Judge Wiseman	$50,003.63	$19,495.35	$69,498.98
Total		$302,484.32	$1,059,675.59

9. Pursuant to 28 U.S.C. § 1746, I declare under the penalty of perjury that the foregoing is true and correct. Executed on this 11th day of November, 1996.

/s/ Thomas Horst

United States' Reply in Support of Its Partial Motion to Dismiss and Cross-Motion for Summary Judgment

D. Even Accepting Plaintiffs' Erroneous Reading Of The Government's Position, Plaintiffs' Recovery Would Be Substantially Less Than The Amounts Claimed

The basic premise of plaintiffs' erroneous reading of the Government's position (Pl. Opp. 9) is that there is an unconstitutional diminution for every year in which there has been no judicial salary increase. Accepting this erroneous premise as true, it does *not* require the conclusion that the *entire* tax imposed for a year when there is no judicial pay increase constitutes an unconstitutional diminution.

The logical consequence of plaintiffs premise is illustrated in the four schedules attached. One set of schedules shows the calculations for district court judges and another set displays the calculations for circuit court judges. And, since the plaintiffs and defendant disagree as to whether plaintiffs' recovery is limited to the OASDI tax only, or comprehends the HI tax which funds Medicare as well, both alternative calculations are presented. Since the methodology of all four schedules is the same, we will discuss the calculations on Schedule A, "Annual Pay Increases and OASDI Tax Increases—District Court Judges 1984-1996."

Schedule A demonstrates, with respect to district judges and OASDI taxes, the effect of accepting plaintiffs' contention that the effectuation of a cessation of diminution is analyzed on an annual basis. However, the attached schedule also assumes, contrary to plaintiffs' contentions, that each pay raise offsets prospectively *at least* the amount of the current HI and OASDI taxes. Accepting the Government's position that the pay raise caused the unconstitutional diminution in compensation to cease, then

hypothetically *if* there had been no subsequent tax increase and *if* there had been no subsequent pay raise to date, the 1984 "cure" would have meant that there was no further diminution since the same amount of OASDI tax was imposed annually on the same amount of pay to date.

But, of course, there were further increases both in compensation and in OASDI tax. As the schedule demonstrates, in each of the years 1984-1985, 1987, and 1990-1993, the pay raises vastly exceeded increases in the then applicable OASDI taxes. *The only* years when there were no pay raises were 1986, 1988, 1989, and 1994-1996. However, any diminution for 1986 could be no greater than the *increase* of OASDI taxes over the OASDI tax for the prior year which had been offset by the 1985 pay raise, just as the OASDI tax for 1984 of $2,041.20 had been offset by the $2,900 1984 pay raise.[11] The 1985 pay increase of $2,700 (from $76,000 to $78,700) more than offset the $216 increase in OASDI tax from $2,041.20 in 1984 to $2,257.20 in 1985.

Measuring the diminution accordingly on an annual basis, the first possible diminution occurred in 1986, when there was no pay raise but the OASDI tax increased from $2,257.20 in 1985 to $2,394 in 1986—an increase in tax (or a diminution of compensation, using plaintiffs' misunderstanding of the Government's position) of $136.80.[12]

---

[11]The retroactive 1984 pay raise caused the diminution to cease effective February 1984, and did not cure the diminution effected by the imposition of the tax in January 1984 on 1983 compensation. Since, however, any diminution in the years in which there was no pay increase would consist of only the *increase in tax for those years*, all of the increase would constitute a diminution for those years.

[12]This diminution was then cured by the 1987 pay raises. However, there was then a diminution on this theory of $230.40 for 1988, and another current diminution for 1989 of $181.80, making the cumulative diminution for 1989 a total of $412.20. This diminution was then cured by the 1990-1993 pay increases, but the absence of pay raises for 1994-1996 resulted in diminutions for those years.

In schedular form, the pattern and amount of these diminutions in compensation in the years without pay raises were as follows:

Year	Diminution for current year not cured by current pay increase	Cumulative diminution for all years not cured by current pay increases [13]
1986	$136.80	$136.80
1988	230.40	230.40
1989	181.80	412.20
1994	186.00	186.00
1995	37.20	223.20
1996	93.00	316.20
Plus Jan. 1984 diminution		$328.95
Cumulative total		$1,833.75

Of course, the cumulative pay increases from 1984 through 1996 were very much greater. The total cumulative diminution, on this basis, as set out on Schedules A, B, C, and D, are as follows:

Schedule A	Annual Pay Increases and OASDI Tax Increases District Court Judges 1984 - 1996	$1,833.75
Schedule B	Annual Pay Increases and FICA Tax Increases District Court Judges 1984 - 1996	$2,080.52
Schedule C	Annual Pay Increases and OASDI Tax Increases Circuit Court Judges 1984 - 1996	$1,955.25
Schedule D	Annual Pay Increases and FICA Tax Increases Circuit Court Judges 1984 - 1996	$2,410.54

---

[13]Assuming that each annual FICA tax increase must be offset by an equal or greater pay increases for that year the absence of a current pay increase in two or more successive years means that the diminution in each succeeding (non-pay raise) year is the total of all increases in FICA tax since the last judicial pay raise.

SCHEDULE A

Annual Pay Increases and OASDI Tax Increases - District Court Judges 1984-1996

(1) Date	(2) Pay Subsequent to Date	(3) Pay Prior to Date	(4) Current Pay Increase (2) - (3)	(5) OASDI Tax Subsequent to Date	(6) OASDI Tax Prior to Date	(7) Current OASDI Tax Increase (5) - (6)	(8) Excess of Current Pay Increase (Col. 4) over current OASDI Increase (Col. 7)	(9) "Deficiency" of Current Pay Increase (Col. 4) over Current OASDI Tax Increase (Col.7)	(10) Cumulative Current "Deficiency, not cured by Current pay Increase
1/1/1984	76,000	73,100	2,900	2,041.20	--	2,041.20	858.80	--	(328.95)*/
1/1/1985	78,700	76,000	2,700	2,257.20	2,041.20	216.00	2,484	--	--
1/1/1986	78,700	78,700	--	2,394	2,257.20	136.80	--	(136.80)	(136.80)
1/1/1987 3/1/1987	81,100 89,500	78,700 81,100	2,400 8,400	-- 2,496.60	-- 2,394	-- 102.60	-- 10,897.40	-- --	--
1988	89,500	89,500	--	2,727	2,496.60	230.40	--	(230.40)	(230.40)
1989	89,500	89,500	--	2,908.80	2,727	181.80	--	(181.80)	(412.20)
2/1/1990	96,600	89,500	7,100	3,180.60	2,908.80	271.80	6,828.20	--	--
1/1/1991	125,100	96,600	28,500	3,310.80	3,180.60	130.20	28,369.80	--	--
1/1/1992	129,500	125,100	4,400	3,441	3,310.80	130.20	4,269.80	--	--
1/1/1993	133,600	129,500	4,100	3,571.20	3,441	130.20	3,969.80	--	--
1994	133,600	133,600	--	3,757.20	3,571.20	186.00	--	(186.00)	(186.00)
1995	133,600	133,600	--	3,794.40	3,757.20	37.20	--	(37.20)	(223.20)
1996	133,600	133,600	--	3,887.40	3,794.40	93.00	--	(93.00)	(316.20)
Cumulative Total Col 10									(1,833.75)

* Although, as Col. 9 sets out, for 1984 there was no deficiency of Current Pay Increase over Current OASDI Increase, Col. 10 for 1984 includes the diminution of 1983 compensation paid in January 1984 not cured by the retroactive pay increase. Defs. Proposed Findings 8.

BEST AVAILABLE COPY

SCHEDULE B

Annual Pay Increases and FICA Tax Increases - District Court Judges 1984-1996

(1) Date	(2) Pay Subsequent to Date	(3) Pay Prior to Date	(4) Current Pay Increase (2) - (3)	(5) FICA Tax Subsequent to Date	(6) FICA Tax Prior to Date	(7) Current FICA Tax Increase (5) - (6)	(8) Excess of Current Pay Increase (Col. 4) over current FICA Increase (Col. 7)	(9) "Deficiency" of Current Pay Increase (Col. 4) over Current FICA Tax Increase (Col. 7)	(10) Cumulative Current "Deficiency, not cured by Current pay Increase
1/1/1984	76,000	73,100	2,900	2,532.60	464.10	2,068.50	831.50	--	(408.14) */
1/1/1985	78,700	76,000	2,700	2,791.80	2,532.60	259.20	2,440.80	--	--
1/1/1986	78,700	78,700	--	3,003	2,791.80	211.20	--	(211.20)	(211.20)
1/1/1987 3/1/1987	81,100 89,500	78,700 81,100	2,400 8,400	-- 3,131.70	-- 3,003	-- 128.70	-- 10,671.30	--	--
1988	89,500	89,500	--	3,379.50	3,131.70	247.80	--	(247.80)	(247.80)
1989	89,500	89,500	--	3,604.80	3,379.50	225.30	--	(225.30)	(473.10)
2/1/1990	96,600	89,500	7,100	3,924.45	3,604.80	319.65	6,780.35	--	--
1/1/1991	125,100	96,600	28,500	5,090.29	3,924.45	1,165.84	27,334.16	--	--
1/1/1992	129,300	125,100	4,400	5,313.44	5,090.29	223.15	4,176.85	--	--
1/1/1993	133,600	129,500	4,100	5,503.42	5,313.44	189.98	3,910.02	--	--
1994	133,600	133,600	--	5,694.38	5,503.42	190.96	--	(190.96)	(190.96)
1995	133,600	133,600	--	5,731.58	5,694.38	37.20	--	(37.20)	(228.16)
1996	133,600	133,600	--	5,824.58	5,731.58	93.00	--	(93.00)	(321.16)
Cumulative Total Col. 10									(2,080.52)

* This chart assumes that recovery of the 1983 III tax is barred by limitations. Although, as Col. 9 sets out for 1984, there was no deficiency of Current Pay Increase over Current FICA Increase, Col. 10 for 1984 includes the diminution of 1983 compensation paid in January 1984 not cured by the retroactive pay increase. Defi. Proposed Findings 8.

SCHEDULE C

Annual Pay Increases and OASDI Tax Increases -Circuit Court Judges 1984-1996

(1) Date	(2) Pay Subsequent to Date	(3) Pay Prior to Date	(4) Current Pay Increase (2) - (3)	(5) OASDI Tax Subsequent to Date	(6) OASDI Tax Prior to Date	(7) Current OASDI Tax Increase (5) (6)	(8) Excess of Current Pay Increase (Col. 4) over current OASDI Increase (Col. 7)	(9) "Deficiency" of Current Pay Increase (Col. 4) over Current OASDI Tax Increase (Col. 7)	(10) Cumulative Current "Deficiency, not cured by Current pay Increase
1/1/1984	80,400	77,300	3,100	2,041.20	–	2,041.20	1,058.80	–	(347.85) */
1/1/1985	83,200	80,400	2,800	2,237.20	2,041.20	216	2,584	–	–
1/1/1986	83,200	83,200	--	2,394	2,257.20	136.80	–	(136.80)	(136.80)
1/1/1987 2/1/1987	85,700 95,000	83,200 85,700	2,500 9,300	– 2,496.60	-- 2,394	-- 102.60	– 11,697.40	(102.60)	(102.60)
1988	95,000	95,000	--	2,727	2,496.60	220.40	--	(220.40)	(220.40)
1989	95,000	95,000	--	2,908.80	2,727	181.80	--	(181.80)	(412.20)
2/1/1990	102,300	95,000	7,300	3,180.60	2,908.80	271.80	7,228.20	–	–
1/1/1991	132,700	102,300	30,200	3,310.80	3,180.60	130.20	30,069.80	--	–
1/1/1992	137,300	132,700	4,600	3,441	3,310.80	130.20	4,469.80	--	–
1/1/1993	141,700	137,300	4,400	3,571.20	3,441	130.20	4,269.80	--	–
1994	141,700	141,700	--	3,757.20	3,571.20	186	--	(186.00)	(186.00)
1995	141,700	141,700	–	3,794.40	3,757.20	37.20	-	(37.20)	(223.20)
1996	141,700	141,700	--	3,887.40	3,794.40	93.00	–	(93.00)	(316.20)
Cumulative Total Col. 10									(1,955.25)

* Although, as Col. 9 sets out for 1984, there was no deficiency of Current Pay Increase over Current OASDI Increase, Col. 10 for 1984 includes the diminution of 1983 compensation paid in January 1984 not cured by the retroactive pay increase. Deft. Proposed Findings 9.

SCHEDULE D

Annual Pay Increases and FICA Tax Increases -Circuit Court Judges 1984-1996

(1) Date	(2) Pay Subsequent to Date	(3) Pay Prior to Date	(4) Current Pay Increase (2) - (3)	(5) FICA Tax Subsequent to Date	(6) FICA Tax Prior to Date	(7) Current FICA Tax Increase (5) - (6)	(8) Excess of Current Pay Increase (Col. 4) over current FICA Increase (Col. 7)	(9) "Deficiency" of Current Pay Increase (Col. 4) over Current FICA Tax Increase (Col. 7)	(10) Cumulative Current "Deficiency, not cured by Current pay Increase
1/1/1984	80,400	77,300	3,100	2,532.60	464.10	2,068.50	1,031.50	--	(431.59) */
1/1/1985	83,200	80,400	2,800	2,791.80	2,532.60	259.20	2,540.80	--	--
1/1/1986	83,200	83,200	--	3,003	2,791.80	211.20	--	(211.20)	(211.20)
1/1/1987 3/1/1987	85,700 95,000	83,200 85,700	2,500 9,300	-- 3,131.70	-- 3,003	-- 128.70	-- 11,671.30	--	--
1988	95,000	95,000	--	3,379.50	3,131.70	247.80	--	(247.80)	(247.80)
1989	95,000	95,000	--	3,604.80	3,379.50	225.30	--	(255.30)	(503.10)
2/1/1990	102,500	95,000	7,500	3,924.45	3,604.80	319.65	7,180.35	--	--
1/1/1991	132,700	102,500	30,200	5,198.49	3,924.45	1,274.04	28,925.96	--	--
1/1/1992	137,300	132,700	4,600	5,328.90	5,198.49	130.41	4,469.59	--	--
1/1/1993	141,700	137,300	4,400	5,528.70	5,328.90	199.80	4,200.20	--	--
1994	141,700	141,700	--	5,811.85	5,528.70	283.15	--	(283.15)	(283.15)
1995	141,700	141,700	--	5,849.05	5,811.85	37.20	--	(37.20)	(320.35)
1996	141,700	141,700	--	5,942.05	5,849.05	93.00	--	(93.00)	(413.35)
Cumulative Total Col. 10									(2,410.54)

* This chart assumes that recovery of the 1983 III tax is barred by limitations. Although, as Col. 9 sets out for 1984, there was no deficiency of Current Pay Increase over Current FICA Increase, Col. 10 for 1984 includes the diminution of 1983 compensation paid in January 1984 not cured by the retroactive pay increase. Defl. Proposed Findings 9.

Supreme Court of the United States

No. 99 -1978
United States, Petitioner

v.

Terry J. Hatter, Jr., Judge, United States District Court for the Central District of California, et al.

ORDER ALLOWING CERTIORARI.
Filed October 16, 2000.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Federal Circuit is granted.

October 16, 2000

Justice Stevens and Justice O'Connor took no part in the consideration or decision of this petition.

NOV 30 2000

NOV 30 2000

No. 99-1978

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

SETH P. WAXMAN
Solicitor General
Counsel of Record

DAVID W. OGDEN
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

DAVID M. COHEN
DOUGLAS N. LETTER
JEANNE E. DAVIDSON
ANNE MURPHY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

This case concerns Congress's actions to bring federal judges within the Medicare hospital insurance (HI) program and Social Security old-age, survivors, and disability insurance (OASDI) program by extending coverage under those programs, as well as the taxes financing those programs, to the employment of Article III judges. The questions presented are:

1. Whether Congress violated the Compensation Clause, U.S. Const. Art. III, § 1, when it extended the taxes financing the HI and OASDI programs to the judicial salaries of respondents, who were sitting Article III judges at the time those taxes were first applied to judicial salaries.

2. Whether any constitutional violation ended when Congress increased the statutory salaries of federal judges by an amount greater than the amount of HI and OASDI taxes deducted from respondents' judicial salaries.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Constitutional and statutory provisions involved	2
Statement	2
Summary of argument	14
Argument:	
I. Congress did not violate the Compensation Clause when it extended social security taxes to judicial salaries	17
A. The application of a nondiscriminatory tax to judicial salaries does not violate the Compensation Clause	17
1. *Evans* v. *Gore*, on which the court of appeals relied, should be overruled	17
2. The diminution of judicial compensation prohibited by Article III is a reduction in judges' salary stated in law, not a decrease in their effective take-home pay net of taxes	28
B. Congress's extension of social security taxes to judicial salaries did not impermissibly discriminate against Article III judges	37
II. Any constitutional violation terminated when Congress increased the statutory salaries of federal judges in an amount greater than the OASDI and HI taxes deducted from those salaries	40
Conclusion	44

TABLE OF AUTHORITIES

Cases: Page

Atkins v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978) 30, 36
Bowen v. *Public Agencies Opposed to Soc. Sec. Entrapment*, 477 U.S. 41 (1986) 37
Collector v. *Day*, 78 U.S. (11 Wall.) 113 (1871) 15, 18, 22
Commssioners of Northlamberland County v. *Chapman*, 2 Rawle 73 (Pa. 1829) 23-24
Commonwealth ex rel. Hepburn v. *Mann*, 5 Watts & Serg. 403 (1843) 25
Cooper v. *Commissioner of Income Tax for Queensland*, (1907) 4 C.L.R. 1304 (Austl.) 26, 27
Davis v. *Michigan Dep't of the Treasury*, 489 U.S. 803 (1989) 22
Dobbins v. *Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842) 18, 28
du Pont v. *Green*, 195 A. 273 (Del. 1937) 24
Evans v. *Gore*, 253 U.S. 245 (1920) ..... *passim*
Gordy v. *Dennis*, 5 A.2d 69 (Md. 1939) 25
Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939) 22-23
Jefferson County v. *Acker*:
527 U.S. 423 (1999) 22
210 F.3d 1317 (11th Cir. 2000), petition for cert. pending, No. 00-455 33
Krause v. *Commissioner of Inland Revenue*, 1929 A. D. 286 (S. Afr.) 26-27
Long v. *Watts*, 110 S.E. 765 (N.C. 1922) 25
Martin v. *Wofford*, 107 S.W.2d 267 (Ky. 1937) 25
McCulloch v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819) 22
Miles v. *Graham*, 268 U.S. 501 (1925) 19-20

Cases—Continued: Page

New Orleans v. *Lea*, 14 La. Ann. 197 (1859) 25
O'Malley v. *Woodrough*, 307 U.S. 277 (1939) 9, 14, 20, 21, 26, 27, 43
Opinions of the Justices, In re, 144 So. 111 (Ala. 1932) 25
Pollock v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895) 18, 22
Poorman v. *State Bd. of Equalization*, 45 P.2d 307 (Mont. 1935) 25
South Carolina v. *Baker*, 485 U.S. 505 (1988) 22
State ex rel. Wickham v. *Nygaard*, 150 N.W. 513 (Wis. 1915) 24
Taylor v. *Gehner*, 45 S.W.2d 59 (Mo. 1931) 24
The Judges v. *Attorney-General for Saskatchewan*, 53 Times L.R. 464 (P.C. 1937) 26
United States v. *Hatter*, 519 U.S. 801 (1996) 10
United States v. *Will*, 449 U.S. 200 (1980) 14, 21, 22, 30, 33, 41, 42

Constitutions, statutes and executive orders:

U.S. Const.:
Art. II, § 1, Cl. 7 ..... 28, 29
Art. III ..... *passim*
§ 1 (Compensation Clause) ..... *passim*
Amend. XXVII 31
Md. Const. Art. 3, § 35A 25
Pa. Const. Art. 5:
§ 2 (1790) 24
§ 16 (1873) 25
§ 18 (1873) 25
Act of Apr. 10, 1869, ch. 22, § 5, 16 Stat. 45 ..... ,3
Act of May 22, 1920, ch. 195, 41 Stat. 614 3
Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13205, 100 Stat. 313 37

Statutes and executive orders—Continued: Page

Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11331(b), 104 Stat. 1388 38
Revenue Act of 1918, ch. 18, § 211, 40 Stat. 1062 33
Revenue Act of 1942, ch. 619, § 172(a), 56 Stat. 884 33
Revenue Act of 1951, ch. 521, § 101, 65 Stat. 459 33
Revenue and Expenditure Control Act of 1968, Pub. L. No. 364, § 102, 82 Stat. 251 33
Social Security Act Amendents of 1950, ch. 809, § 106, 64 Stat. 514 37
Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65:
§ 101(b)(1):
97 Stat. 69 4-5
97 Stat. 70 5
§ 101(b)(2), 97 Stat. 70 5
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, Tit. II, Subtit. E, Pt. III, § 278, 96 Stat. 559 4
Tucker Act, 28 U.S.C. 1491(a) 8
War Revenue Act, ch. 63, 40 Stat. 300:
§ 1, 40 Stat. 300 33
§ 2, 40 Stat. 301 33
5 U.S.C. 719 (1925) 3
5 U.S.C. 8331 *et seq.* 3
26 U.S.C. 3101 ..... 2, 5
26 U.S.C. 3101(a) 3, 4, 33
26 U.S.C. 3101(b) 3, 4, 33
26 U.S.C. 3121 (1994 & Supp. IV 1998) 2, 5
26 U.S.C. 3121(b) (1994 & Supp. IV 1998) 4, 5, 37
26 U.S.C. 3121(b)(5) (1994 & Supp. IV 1998) 5
26 U.S.C. 3121(b)(6)(A) (1982) 4
26 U.S.C. 3121(b)(7)(F) 38
26 U.S.C. 3121(u) 4, 5
26 U.S.C. 3121(u)(1)(A) (1982) 4
26 U.S.C. 3121(u)(2)(A) 38

Statutes and executive orders—Continued: Page

28 U.S.C. 44 (1994 & Supp. IV 1998) 8
28 U.S.C. 135 8
28 U.S.C. 371 (1994 & Supp. IV 1998) 4, 7, 39
28 U.S.C. 371(a) 3
28 U.S.C. 2109 10
28 U.S.C. 2401(a) 10
28 U.S.C. 2501 10
42 U.S.C. 402(a) 3
42 U.S.C. 409(a) (1994 & Supp. IV 1998) 3
42 U.S.C. 413(a)(2)(A) 3
42 U.S.C. 414(a)(2) 3
42 U.S.C. 418 ..... 37, 38
42 U.S.C. 426(a)(2)(A) 3
Exec. Order No. 12,387, 47 Fed. Reg. 44,981 (1982) 8
Exec. Order No. 12,456, 49 Fed. Reg. 347 (1983) 8
Exec. Order No. 12,477, 49 Fed. Reg. 22,041 (1984) 8
Exec. Order No. 12,487, 49 Fed. Reg. 36,493 (1984) 8
Exec. Order No. 13,144, 64 Fed. Reg. 72,242 (1999) 8

Miscellaneous:

Comment, *Further Limitations upon Federal Income Taxation*, 30 Yale L.J. 75 (1920) 20
Corwin, Edward S., *Constitutional Law in 1919-1920. I*, 14 Am. Pol. Sci. Rev. 635 (1920) 20
1 *Debates and Proceedings in the Congress of the United States* (Joseph Gales comp. 1789) 31
The Federalist (Clinton Rossister ed. 1961):
No. 73 (Alexander Hamilton) 30
No. 79 (Alexander Hamilton) 30
Fellman, David, *The Diminution of Judicial Salaries*, 24 Iowa L. Rev. 89 (1938) 20
Hall, James Parker, Comment on Recent Cases, 20 Ill. L. Rev. 376 (1925) 20
Letter of Chief Justice Taney to Mr. Chase, 157 U.S. 701 (1863) 27
Lowndes, Charles L.B., *Taxing Income of the Federal Judiciary*, 19 Va. L. Rev. 153 (1932) 20

Miscellaneous—Continued:	Page
H.R. Rep. No. 25, 98th Cong., 1st Sess. (1983)	6, 38
H.R. Rep. No. 241, 99th Cong., 1st Sess., Pt. 1 (1986)	38
13 Op. Att'y Gen. 161 (1869)	28
31 Op. Att'y Gen. 475 (1919)	28, 30, 31
Recent Case, 3 U. Chi. L. Rev. 141 (1935)	20
Recent Case, 43 Harv. L. Rev. 318 (1929)	20
Recent Case, *Federal Taxation of Judicial Compensation*, 7 Va. L. Rev. 69 (1920)	20
Recent Important Decision, 18 Mich. L. Rev. 697 (1920)	20
S. Rep. No. 146, 99th Cong., 1st Sess. (1985)	38
S. Rep. No. 494, 97th Cong., 2d Sess., Vol. 1 (1982)	5-6

In the Supreme Court of the United States

No. 99-1978

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The initial decision of the United States Claims Court, dismissing this case for lack of jurisdiction (Pet. App. 12a-18a), is reported at 21 Cl. Ct. 786. The decision of the court of appeals reversing that dismissal (Pet. App. 19a-29a) is reported at 953 F.2d 626. The decision of the Court of Federal Claims on remand, dismissing respondents' claims on the merits (Pet. App. 30a-53a), is reported at 31 Fed. Cl. 436. The decision of the court of appeals reversing that dismissal (Pet. App. 54a-66a) is reported at 64 F.3d 647. The decision of this Court, affirming that decision of the court of appeals under 28 U.S.C. 2109 because of the lack of a quorum (Pet. App. 69a), is reported at 519 U.S. 801.

The further decision of the Court of Federal Claims on remand, ruling in favor of the government on the issues of damages and the statute of limitations and awarding some respondents limited damages (Pet. App. 70a-111a), is re-

ported at 38 Fed. Cl. 166. The opinion of the panel of the court of appeals reversing the Court of Federal Claims as to damages (Pet. App. 112a-127a) is reported at 185 F.3d 1356. The order of the court of appeals vacating the panel's judgment and ordering rehearing en banc on the issue of the statute of limitations (Pet. App. 128a-129a) is reported at 199 F.3d 1316. The opinion of the en banc court of appeals, reversing the Court of Federal Claims on both damages and statute of limitations (Pet. App. 1a-11a), is reported at 203 F.3d 795.

JURISDICTION

The judgment of the en banc court of appeals was entered on February 9, 2000. On May 2, 2000, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including June 8, 2000. The petition for a writ of certiorari was filed on June 8, 2000, and was granted on October 16, 2000 (J.A. 143). This Court's jurisdiction rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Compensation Clause, U.S. Const. Art. III, § 1, and pertinent provisions of 26 U.S.C. 3101 and 3121 (1994 & Supp. IV 1998) are set forth in the appendix to the petition for a writ of certiorari (Pet. App. 130a-132a).

STATEMENT

1. More than 90% of the paid civilian labor force in the United States is engaged in employment covered by the Social Security old-age, survivors, and disability insurance (OASDI) program and the Medicare hospital insurance (HI) program. J.A. 41. Employees earn credits towards eligibility for OASDI and HI benefits based on their

employment.[1] Both programs are financed in part out of taxes imposed "on the income of every individual," in amounts equal to certain percentages of an employee's wages. See 26 U.S.C. 3101(a) and (b).

Before 1983, the employment of Article III judges, as well as almost all other federal employees, was excluded from both taxes and benefits under the HI and OASDI programs. Federal judges and other federal employees were covered by separate retirement systems. Since 1869, Article III judges have been entitled to retire after meeting certain age and service requirements and to receive lifetime annuities equal to their salary at their retirement. Those annuities are financed entirely from general tax revenues. See 28 U.S.C. 371(a); Act of Apr. 10, 1869, ch. 22, § 5, 16 Stat. 45. Beginning in 1920, most other federal employees were eligible to receive retirement annuities under the Civil Service Retirement System (CSRS) upon meeting certain service requirements, and were also required to contribute part of their salary to finance the CSRS program. See 5 U.S.C. 8331 *et seq.*; 5 U.S.C. 719 (1925) (mandatory deduction from federal employees' salary to finance retirement system); Act of May 22, 1920, ch. 195, 41 Stat. 614. Federal judges and employees could, however, receive OASDI and HI benefits based on their non-federal employment if they had accrued sufficient credits in such employment (and in some cases based on their spouses' coverage).

On January 1, 1983, employees in all three Branches of the federal government, including judges, first began to earn

---

[1] Eligibility for HI benefits, in general, is tied to eligibility for Social Security old-age benefits. See 42 U.S.C. 426(a)(2)(A). Eligibility for old-age benefits is based on an individual's having paid OASDI taxes for 40 "quarters of coverage." See 42 U.S.C. 402(a), 414(a)(2). "[Q]uarters of coverage" is tied to payment of "wages," which is defined in terms of remuneration for "employment." See 42 U.S.C. 409(a) (1994 & Supp. IV 1998), 42 U.S.C. 413(a)(2)(A).

credits for HI coverage on the basis of their federal employment, and also first became subject to the HI tax on their salaries. One year later, on January 1, 1984, newly hired federal employees and judges began to earn credits for Social Security old-age benefits on the basis of their federal service, and also became subject to the OASDI tax on their salaries.[2] The 1983 and 1984 amendments also imposed HI

[2] The taxes on employees' wages that finance in part the OASDI and HI programs are imposed by 26 U.S.C. 3101(a) and (b). Both Sections impose a tax on income equal to a percentage of the employee's wages with respect to "employment," as defined in 26 U.S.C. 3121(b) (1994 & Supp. IV 1998). Section 3121(b) and a companion provision, Section 3121(u), have undergone several changes relevant to this case. Before September 3, 1982, Section 3121(b) excluded from the definition of "employment" "service performed in the employ of the United States * * * if such service is covered by a retirement system established by a law of the United States." 26 U.S.C. 3121(b)(6)(A) (1982). That provision exempted Article III judges from the HI and OASDI taxes, because those judges were (and are) covered by another retirement system established by 28 U.S.C. 371 (1994 & Supp. IV 1998). That system permits a judge to retire from service on an annuity equal to the judge's salary at the time of retirement.

Congress extended the HI tax to federal judges' salaries in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, Tit. II, Subtit. E, Pt. III, § 278, 96 Stat. 559-563. TEFRA added a new Section 3121(u)(1)(A), which provided that, "[f]or purposes of the [Medicare hospital insurance tax] imposed by section 3101(b) * * * paragraph (6) of [26 U.S.C. 3121(b)] shall be applied without regard to subparagraph[] (A) * * * thereof." 26 U.S.C. 3121(u)(1)(A) (1982); see Pub. L. No. 97-249, § 278, 96 Stat. 559. That provision of TEFRA, in effect, instructed that the exclusion of federal judges' salaries from the definition of "employment" should be disregarded for purposes of the HI tax, and thus extended that tax (but not the OASDI tax) to judges' salaries. That provision of TEFRA also effectively extended the HI tax, but not the OASDI tax, to the salaries of federal employees who were covered by the CSRS.

Congress extended the OASDI tax to federal judges' (and other federal employees') salaries in the Social Security Amendments of 1983, Pub. L.

and OASDI taxes for the first time on the salaries of the President, Vice President, cabinet members, political appointees in the Senior Executive Service, and Members of Congress. Those employees and officials remain subject to HI and OASDI taxes today. See 26 U.S.C. 3121(b)(5) (1994 & Supp. IV 1998).

Congress brought federal employees, including federal judges, within the HI and OASDI systems in part out of concern that those employees were not paying a fair share of the cost of financing benefits under those programs, which are funded out of current HI and OASDI taxes. When Congress in 1982 enacted legislation to bring federal employees within the HI system, the Senate Finance Committee noted as follows:

> Many active Federal civilian employees have worked long enough (or their spouses have) in employment covered by social security to become insured under the Hospital Insurance program. However, while most workers in covered social security employment are

No. 98-21, § 101(b)(1), 97 Stat. 69, which again amended 26 U.S.C. 3121. The Social Security Amendments of 1983 redefined "employment" in Section 3121(b)(5) generally to exclude "service performed in the employ of the United States," but also excluded from that exclusion service performed by federal judges, among others. See Pub. L. No. 98-21, § 101(b)(1), 97 Stat. 70. In addition, the Social Security Amendments of 1983 amended Section 3121(u) to provide that, for the purpose of the Medicare tax, Section 3121(b) "shall be applied without regard to paragraph (5) thereof." See Pub. L. No. 98-21, § 101(b)(2), 97 Stat. 70. Because the Social Security Amendments of 1983 excluded service by federal judges from the federal-employment exclusion from the general definition of "employment," it subjected federal judges to the HI and OASDI taxes of Section 3101, which falls on the income of all wage-earners in respect of their employment, unless excluded. Because the same Act directed that the exclusion of federal employees in Section 3121(b)(5) be disregarded for HI tax purposes, it again brought federal employees, including judges, within the coverage of the HI tax.

> subject to the Hospital Insurance tax throughout their entire working careers, Federal employees may earn the same coverage with relatively fewer years of work subject to the tax. The committee believes that Federal workers should bear a more equitable share of the costs of financing the benefits to which many of them eventually become entitled.
>
> The bill, therefore, extends Medicare coverage to all members of the Federal workforce in the same way coverage is provided to most other workers.

S. Rep. No. 494, 97th Cong., 2d Sess. Vol. 1, at 378 (1982). Similarly, when Congress in 1983 enacted legislation to bring many federal employees (including federal judges) within the Social Security old-age benefit system, the House Ways and Means Committee observed that the expansion of coverage to include "several groups of workers previously excluded from participation in the program" was intended to "maintain the social security program on a sound financial basis" and to "assur[e] both the short-term and long-term financial stability of the program." H.R. Rep. No. 25, 98th Cong., 1st Sess. 3 (1983).

When Congress considered extending OASDI benefits and taxes to federal employment in 1983, it recognized that doing so could subject federal employees under the CSRS program to a double imposition—the mandatory contribution to CSRS and the OASDI tax. Congress also recognized that many federal employees had long relied on the CSRS to make retirement and estate plans. Thus, to treat incumbent federal workers as equally as possible to other wage earners, Congress allowed them to continue to participate in CSRS rather than the OASDI program. See H.R. Rep. No. 25, *supra*, at 14; J.A. 112-113. Federal judges, however, were not subject to any similar mandatory civil-service retirement contribution, as they are entitled to retire on an annuity

financed out of general tax revenues. Thus, Congress had no occasion to permit judges to "opt out" of the OASDI program to avoid a double imposition.[3] Moreover, after 1984, federal judges earned coverage for OASDI benefits (in addition to the lifetime annuity provided under 28 U.S.C. 371 (1994 & Supp. IV 1998)) based on their judicial employment, whereas other incumbent federal employees who continued to participate in the CSRS program remained ineligible for OASDI benefits based on their federal employment.

2. On December 29, 1989, eight federal judges[4] (the "early-filing judges") filed suit against the United States in the United States Claims Court (the predecessor to the Court of Federal Claims). They contended that Congress had unconstitutionally diminished their compensation, in violation of the Compensation Clause, U.S. Const. Art. III, § 1, when, on January 1, 1984, it made their judicial salaries subject to the OASDI tax.[5] J.A. 23-27. Those eight judges

---

[3] Congress also permitted a small number of high-level federal officials subject to the OASDI tax to opt out of CSRS. That option was afforded because, otherwise, those officials would have been subject to a mandatory double contribution for retirement income security purposes. Congress did not permit those officials to opt out of Social Security taxes; it instead required them, like judges, to pay OASDI taxes but made the contribution to CSRS optional for those officials. See J.A. 64-65.

[4] Those eight judges were District Judges Hatter, Arceneaux, Beer, Burciaga, McNamara, Ramirez, and Wiseman, and Circuit Judge Pregerson. District Judges Bowen and Roettger were also plaintiffs in the original suit, but did not appeal from the adverse decision of the Claims Court dismissing the case on jurisdictional grounds. J.A. 24-25; Pet. App. 19a. After the court of appeals reversed that dismissal and remanded, Judges Bowen and Roettger rejoined the lawsuit, when several other judges also became plaintiffs. See *id.* at 75a n.5. For statute of limitations purposes, Judges Bowen and Roettger were grouped with the "later-filing judges." See pp. 9-10, *infra*.

[5] The Compensation Clause provides: "The Judges, both of the supreme and inferior Courts, * * * shall, at stated Times, receive for their

were all sitting judges as of January 1, 1984, when the OASDI tax first became applicable to judicial salaries. The judges did not contend that Congress had diminished their prescribed statutory salary. Rather, they contended that the incidence of the OASDI tax on their salary on January 1, 1984, effectively and unconstitutionally diminished that salary, and that the unconstitutional diminution continued to the present day, despite substantial salary increases received by those judges after January 1, 1984.[6]

The Claims Court initially dismissed the suit on jurisdictional grounds, but the court of appeals reversed and remanded, ruling that the lower court had jurisdiction under the Tucker Act, 28 U.S.C. 1491(a). Pet. App. 19a-29a.[7] On

---

Services, a Compensation, which shall not be diminished during their Continuance in Office."

[6] From December 17, 1982, to December 31, 1983, just before Congress extended the OASDI tax to federal judges, circuit judges were paid an annual salary of $77,300, and district judges were paid an annual salary of $73,100. See Exec. Order No. 12,387, 47 Fed. Reg. 44,981, 44,988 (1982). In 1984, after OASDI taxes were first imposed upon judges, the annual salaries of circuit judges were raised to $80,400, and those of district judges were raised to $76,000. Exec. Order No. 12,456, 49 Fed. Reg. 347, 360 (1983), as amended by Exec. Order No. 12,477, 49 Fed. Reg. 22,041, 22,052 (1984), and Exec. Order No. 12,487, 49 Fed. Reg. 36,493 (1984). Although the Executive Order increasing judges' salaries in 1984 was promulgated on September 1, 1984, the increase in judges' salaries was made retroactive to the first date of the first applicable pay period commencing on January 1, 1984. *Ibid.*; see Pet. App. 86a.

Since that time, federal judges have received additional salary increases. Circuit judges currently receive $149,900 annually, and district judges receive $141,300. See Exec. Order No. 13,144, 64 Fed. Reg. 72,242 (1999); see generally 28 U.S.C. 44 and 135 (1994 & Supp. IV 1998), Historical Notes (describing salary increases from 1919 for circuit judges and district judges, respectively).

[7] The Claims Court dismissed the suit on the ground that respondents had not filed administrative tax-refund claims. Pet. App. 12a-18a. The court of appeals ruled, however, that respondents were not required to file

remand, respondents filed a second amended complaint on January 11, 1993. That amended complaint added eight more judges (the "later-filing judges") as new plaintiffs.[8] The new complaint also challenged for the first time (on behalf of all respondents) the constitutionality of the HI tax, which had first been imposed on judicial salaries on January 1, 1983. J.A. 34. The parties cross-moved for summary judgment, and the court granted summary judgment for the United States, concluding that the application of the OASDI and HI taxes to respondents' judicial salaries was constitutional. Pet. App. 30a-53a.

3. The court of appeals reversed, and held that Congress's extension of the HI and OASDI taxes to the salaries of already-commissioned federal judges violated the Compensation Clause. Pet. App. 54a-66a. The court found this case controlled by *Evans* v. *Gore*, 253 U.S. 245 (1920), which held that the Compensation Clause prohibited the imposition of the federal income tax on the salary of a federal judge who had been appointed before Congress brought judicial salaries within the income subject to federal income tax. Pet. App. 59a. The court acknowledged (*id.* at 59a-60a) that this Court's subsequent decision in *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), upheld the application of the income tax to the salaries of federal judges who took office after the income tax was enacted. Nonetheless, the court concluded that it was required to follow *Evans* rather than *O'Malley* because this Court had not expressly overruled *Evans*. See Pet. App. 60a-61a. It therefore remanded the case for a

---

refund claims because one of the counts of their complaint "did not pursue a tax refund. Instead they sought damages for violation of Article III, § 1—an action which is within the Tucker Act jurisdiction of the Claims Court." *Id.* at 26a.

[8] The eight new plaintiffs were, in addition to District Judges Bowen and Roettger (who rejoined the case after the remand, see p. 7 n.4, *supra*), District Judges Evans, Mentz, Owens, Wilhoit, Baker, and Mihm. J.A. 31.

determination of the amount to which the HI and OASDI taxes had diminished respondents' compensation. *Id.* at 65a-66a.

4. The United States filed a petition for a writ of certiorari. Four Justices recused themselves from consideration of the petition. Because of those recusals, the Court lacked a quorum of six Justices to consider the petition. The Court therefore entered an order under 28 U.S.C. 2109, which provides that, when a quorum of the Court is absent, the judgment of the court of appeals shall be affirmed with the same effect as an affirmance by an equally divided Court. See *United States* v. *Hatter*, 519 U.S. 801 (1996); Pet. App. 69a.

5. On remand from the court of appeals, the Court of Federal Claims ruled that all the claims of the later-filing judges (see p. 9, *supra*) and all the respondents' claims based on the HI tax were barred by the six-year statute of limitations for actions against the United States (see 28 U.S.C. 2401(a), 2501). Pet. App. 90a-105a.[9] The court also ruled, as to the early-filing judges' claims based on the OASDI tax, that any constitutional violation had come to an end in 1984 when Congress granted judges a salary increase that exceeded the amount of the OASDI tax applied to their salaries on January 1, 1984. *Id.* at 78a-89a.

---

[9] With respect to the statute of limitations, the court held that the HI claims and all the claims of the later-filing judges were filed more than six years after those claims had accrued, and rejected respondents' arguments that those claims were timely filed under the "continuing claim" doctrine. Pet. App. 101a-105a. The court questioned whether the continuing claim doctrine still exists at all, see *id.* at 103a, but it also concluded that that doctrine does not apply to this case, where "the unlawful diminution consisted of imposition of two new taxes on specific effective dates," *id.* at 105a. Those dates (January 1, 1983 and January 1, 1984), the court held, were the dates on which respondents' claims accrued.

On the latter point, the court observed that, "if, simultaneously with the imposition of a new tax, Congress granted an increase in salary which equaled or exceeded the tax, no diminution in the level of compensation just prior to imposition of the tax would have occurred." Pet. App. 79a. If that is so, the court reasoned, then any constitutional violation caused by the imposition of a new tax must also terminate when Congress raises judges' salaries "in an amount equal to or greater than the amount of the tax[.] * * * [I]f an increase in nominal salary occurred simultaneously with or subsequent to * * * a diminution, the simultaneous or subsequent increase accomplishes a cure to the extent of such increase." *Id.* at 82a. Otherwise, the court noted, Congress could never bring to an end a violation of the Compensation Clause caused by the initial application of a new tax except by repealing the tax (or by specifically granting the affected judges compensation for the tax). Indeed, the court observed that, in respondents' view, even "if Congress awarded all judges a pay raise of $1,000,000 per year retroactive to January 1, 1983 but not specifically or expressly related to the Social Security taxes imposed in 1983 or 1984, it would not cure the diminution resulting from imposition of the taxes," and "all Social Security taxes withheld must be refunded to plaintiffs and there can absolutely be no cure by subsequent increases in salary" granted to all federal judges. *Id.* at 83a-84a.

The court also found that Congress had in fact raised judges' salaries in an amount greater than the OASDI tax imposed on those salaries on January 1, 1984. Pet. App. 86a-87a. It also calculated that judges' salary increases over the pre-1984 compensation base exceeded in each year the total amount that judges paid in HI and OASDI taxes in that year, until by 1993, the annual sums represented by the successive pay increases "are more than ten times higher than the total of Social Security taxes withheld during any

calendar year." See *id.* at 89a-90a. Based on those facts, the court concluded that "no unlawful diminution in judicial compensation occurred" after respondents' salary increase in 1984 took effect. See *id.* at 89a.

The court therefore limited damages to the single deduction of OASDI taxes that occurred before the 1984 salary increase took effect. Because judges are paid on the first day of each calendar month for services rendered during the previous month, the court concluded that the OASDI tax deducted from the judges' salary payment on January 1, 1984 was in fact a tax on their salary earned during December 1983. Pet. App. 77a. The court accordingly entered judgment for respondents in the amount of the OASDI tax deducted from judges' salaries on January 1, 1984—$328.95 for the seven early-filing district judges and $347.85 for the early-filing circuit judge—with compound interest. *Id.* at 77a, 110a-111a.

6. A panel of the court of appeals reversed the Court of Federal Claims' holding that the constitutional violation terminated upon the judges' first salary increase following the initial incidence of the OASDI tax, Pet. App. 116a-125a, but affirmed the dismissal of the HI tax claims and all the later-filing judges' claims as time-barred, *id.* at 125a-127a.

On the former point, the court of appeals rejected the trial court's conclusion that any unconstitutional diminution in judicial compensation caused by application of the OASDI tax to judicial salaries terminated when Congress enacted a general increase in judicial salaries that exceeded the amount of the new tax. In the court of appeals' view, the trial court's approach was deficient because it "would create, with regard to judicial compensation, two different classes of judges." Pet. App. 122a. As the court of appeals put the matter, if the trial court's conclusion were upheld, then those judges who took office after Congress extended OASDI taxes to sitting judges could enjoy "the full benefit of

congressionally-granted salary increases" subsequent to those dates. *Ibid.* On the other hand, those judges who took office before OASDI taxes were applied to judicial salaries "would not receive the Congressionally-granted salary increases which became effective after 1983, because a significant portion of the increases would be allocated to pay the damage award to which they are entitled as a result of the earlier unconstitutional imposition." *Ibid.* The court also remarked that Congress had granted federal judges salary increases to adjust for inflation, and that "[t]o deprive the pre-1983 judges of the benefit of those increases by using them to offset the losses they incurred from the Government's earlier wrongful act would not only be unfair, but would be contrary to Congress's purpose in granting the increases." *Id.* at 125a. Thus, it held, any determination of the duration of a violation of the Compensation Clause and any calculation of damages must be "independent of any generally awarded adjustment to judicial salaries." *Ibid.*

7. Both the United States and respondents sought rehearing and rehearing en banc. The court of appeals denied the United States' petition but granted respondents' petition, which contested the panel's decision that the later-filing judges' claims and all claims based on the HI tax were time-barred. Pet. App. 128a-129a. On rehearing en banc, the court held that respondents' claims challenging both the OASDI and the HI taxes were timely, insofar as they challenged the taxes deducted from their salaries within six years before the claim was filed. *Id.* at 2a-11a.[10] The en banc

[10] The en banc court relied for that conclusion on the "continuing claim" doctrine, under which a claim accrues anew each time the government incurs an alleged obligation to make a payment to the claimant. The court reasoned that, because (in its view) each deduction of OASDI tax from a judge's salary payment continued the Compensation Clause violation, a new claim based on the Clause accrued each time such a deduction was made. See Pet. App. 4a-8a.

court at that time also reinstated the judgment of the panel, insofar as it had reversed the trial court's determination that the Compensation Clause violation came to an end when Congress granted judges a general salary increase. See *id.* at 1a-2a.

SUMMARY OF ARGUMENT

Congress's extension of the Social Security old-age, survivors and disability insurance (OASDI) and Medicare hospital insurance (HI) taxes to the salaries of sitting federal judges did not unconstitutionally diminish the compensation of those judges within the meaning of the Compensation Clause, U.S. Const. Art. III, § 1. The application and extension of a generally applicable, non-discriminatory tax to the salaries of federal judges does not implicate the Compensation Clause. Nor did Congress impermissibly discriminate against federal judges when it extended the OASDI and HI taxes to their salaries. Furthermore, even if there had been any unconstitutional diminution when those taxes were first deducted from sitting judges' salaries, any such constitutional violation would have terminated when Congress increased statutory judicial salaries in an amount that exceeded the amount of the OASDI and HI taxes.

I. A. The court of appeals relied on *Evans* v. *Gore*, 253 U.S. 245 (1920), to conclude that the application of the OASDI and HI taxes to sitting judges' salaries violated the Compensation Clause. This Court should now definitively overrule *Evans* v. *Gore*. In *Evans*, the Court concluded that the Compensation Clause barred the application of the federal income tax to the salary of an Article III judge; that judge happened to have been appointed to his judicial office before the tax was enacted, but that fact was not part of the Court's rationale in *Evans*. The Court's subsequent cases have repudiated *Evans*. In *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), and *United States* v. *Will*, 449 U.S. 200 (1980), the Court made clear that the application of a generally applicable, nondiscriminatory tax to the salary of a federal judge is not an impermissible diminution of his compensation within the prohibition of the Compensation Clause.

The doctrinal basis of the Court's decision in *Evans* has long been demonstrated to be unsound. *Evans* relied heavily on the Court's intergovernmental tax immunity cases prohibiting the federal government and the States from applying their income taxes to the salaries of each other's employees, such as *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1871), but the Court has since overruled that entire line of decisions. *Evans* also claimed support in state-court decisions construing similar provisions under state constitutions, but in fact the weight of state authority is to the contrary, as are decisions of courts in other English-speaking countries. *Evans* also cited a private 1862 letter of Chief Justice Taney and an 1869 opinion of Attorney General Hoar, but they also lend the decision in *Evans* little support. In sum, *Evans* has not withstood closer examination and the test of time and should be disapproved.

Respondents have argued that Congress's extension of OASDI and HI taxes to their salaries nonetheless constituted a diminution of their compensation because, after the taxes took effect, they were left with less "effective" compensation in the form of take-home pay than they had before the taxes were extended to their salaries. The "Compensation" that is protected from diminution by the Constitution, however, is the judges' statutory salary, not their "effective" salary or take-home pay after taxes are deducted. Respondents' construction, if accepted, might well lead to the conclusion that Congress is constitutionally prohibited from granting the President tax relief that is made available to the general population (since the President's "Compensation" may not be increased or diminished during his term of office) or extending generally applicable taxes to their own

salaries (since no law may vary the "Compensation" of Members until an election of Representatives has intervened). Respondents' construction would also suggest that Congress may not adjust even the rates of income tax applicable to the salaries of sitting federal judges, the President, or Members of Congress. These implausible consequences show that respondents' construction should be rejected.

Respondents' theory also has no basis in the policies of the Compensation Clause. The Clause is intended to protect judicial independence and to attract persons of high caliber to judicial service. A nondiscriminatory tax poses no threat to judicial independence. Similarly, while federal judges might well be concerned that Congress could use its power over their statutory salary to deprive them of adequate support, any concern that Congress would manipulate taxes of general applicability for such a purpose is without substance, because federal judges, like all members of the public, have the protection of the political process against excessively burdensome taxes that are generally applicable. Moreover, in bringing judges within the OASDI and HI programs, Congress also gave judges significant benefits, and respondents have pointed to nothing suggesting that OASDI and HI taxes have driven federal judges out of service.

B. Congress's extension of OASDI and HI taxes to judges did not impermissibly discriminate against respondents. In 1983 and 1984, Congress simply brought federal judges within a program that covers 90% of the civilian labor force. Congress therefore did at that time what it could have unquestionably done in 1935 when it first established the Social Security program, namely, subject judicial salaries to a generally applicable tax. Although Congress in 1984 allowed other incumbent federal employees to remain excluded from the OASDI program, it did so only because it

recognized that subjecting those employees to OASDI taxes as well as mandatory contributions for the existing Civil Service Retirement System (CSRS) would have made those employees subject to a double imposition for retirement income security. Federal judges were not similarly situated, because they were and are entitled to receive a lifetime annuity equal to the full salary received at the time of retirement, entirely at taxpayer expense, and so their salaries were not subject to deduction for CSRS or other retirement contributions.

II. Even if Congress did impermissibly diminish the compensation of sitting judges when it brought them within the HI and OASDI programs, that diminution terminated in 1984 when Congress increased judicial salaries in an amount greater than the amount of the new HI and OASDI taxes. After that increase, each judge received greater compensation, even net of the HI and OASDI taxes, than the judge had received before those taxes were first imposed. Congress therefore cannot be charged with any "diminution" in judicial compensation for periods after the enactment of the salary increases for federal judges.

ARGUMENT

I. CONGRESS DID NOT VIOLATE THE COMPENSATION CLAUSE WHEN IT EXTENDED SOCIAL SECURITY TAXES TO JUDICIAL SALARIES

A. The Application Of A Nondiscriminatory Tax To Judicial Salaries Does Not Violate The Compensation Clause

1. Evans *v.* Gore, *On Which The Court Of Appeals Relied, Should Be Overruled*

In holding that the application of OASDI and HI taxes to sitting judges violated the Compensation Clause, the court of appeals believed itself bound by this Court's decision in *Evans* v. *Gore*, 253 U.S. 245 (1920), which held that the Com-

pensation Clause barred the application of the federal income tax to federal judges' salaries. *Evans* should now be definitively overruled. Not only have this Court's own subsequent decisions expressly undermined the reasoning of *Evans*, but that decision rests on a serious misunderstanding of the Compensation Clause.

a. This Court's subsequent decisions have thoroughly disapproved the reasoning of *Evans*. *Evans* involved a federal income tax levied under a 1919 statute on the salary of a federal judge appointed in 1899 (see 253 U.S. at 246), but the Court's opinion did not limit its holding to situations in which the judge's appointment predated the imposition of the tax. Nor did the decision in *Evans* rely on a perception that the unconstitutional diminution was the effective reduction in judicial pay from the gross amount before the taxing act was passed to the amount net of taxes after the tax became effective. Rather, the rationale of *Evans* was that, under the Compensation Clause, Congress must not interfere with the ability of Article III judges to retain the full amount stated in law to be their salary, and may not indirectly diminish that amount by subjecting it to any tax at all. As the Court stated, "all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition." *Id.* at 254.

In reaching that conclusion, the Court in *Evans* relied (253 U.S. at 255) on intergovernmental tax immunity cases such as *Dobbins* v. *Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842), *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1871), and *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895), for the broad proposition that the Framers "were so sedulously bent on securing the independence of the judiciary [that they] intended to protect the compensation of the judges from assault and diminution in the name and form of a tax[.]" *Evans*, 253 U.S. at 256. The Court likened judicial

immunity from income taxes to the intergovernmental tax immunity cases because, it perceived, both principles of immunity were necessary to preserve "independence" (*id.* at 255) in the face of the power to tax, which "carries with it the power to embarrass and destroy" (*id.* at 256) (internal quotation marks omitted). On that premise, the Court concluded that a judge's "compensation is protected from diminution in any form, whether by a tax or otherwise, and is assured to him in its entirety for his support." *Id.* at 263.

Justice Holmes, joined by Justice Brandeis, dissented. They maintained that the inclusion of judicial salaries in the incidence of an income tax is constitutional as long as that tax does not single out judicial compensation but, rather, applies with like force to all citizens. Justice Holmes argued that the constitutional imperative of protecting judicial independence "is a very good reason for preventing attempts to deal with a judge's salary as such, but seems to me no reason for exonerating him from the ordinary duties of a citizen, which he shares with all others." 253 U.S. at 265. "To require a man to pay the taxes that all other men have to pay," he continued, "cannot possibly be made an instrument to attack his independence as a judge. I see nothing in the purpose of this clause of the Constitution to indicate that the judges were to be a privileged class, free from bearing their share of the cost of the institutions upon which their well-being if not their life depends." *Ibid.*

The Court's reasoning and holding in *Evans* were reaffirmed in *Miles* v. *Graham*, 268 U.S. 501 (1925). In *Miles*, the Court held that "the plain rule of *Evans* v. *Gore*" required invalidation of the income tax as applied to the salary of a judge who took office after the income tax was extended to judicial salaries. *Id.* at 509. The Court stated in *Miles* that the Compensation Clause "impose[s] upon Congress the duty definitely to declare what sum shall be received by each judge out of the public funds and the times for payment.

When this duty has been complied with, the amount specified becomes the compensation which is protected against diminution during his continuance in office." *Id.* at 508-509. The Court therefore found no distinction between judges who took office before the taxing act was enacted and those who took office after that date.

b. The Court's decisions in *Evans* and *Miles* exempting judges from income taxes were immediately and forcefully criticized by state courts, courts in other English-speaking countries interpreting similar provisions, and academic commentary.[11] In *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), the Court, acknowledging much of that criticism (see *id.* at 281 nn. 6-8), reconsidered its view of the limitations imposed by the Compensation Clause upon Congress's power to tax, and adopted Justice Holmes's understanding that judicial salaries are as much subject to taxation as the salaries of other citizens. The Court held in *O'Malley* that "a non-discriminatory tax laid generally on net income is not, when applied to the income of a federal judge, a diminution of his salary within the prohibition" of the Constitution. *Id.* at 282.

O'Malley expressly overruled *Miles*. 307 U.S. at 282-283. *O'Malley* did not expressly overrule *Evans*, for Congress had structured the income tax act under review in *O'Malley*

[11] See pp. 24-28, *infra* (discussing state and foreign courts applying similar provisions); see also Edward S. Corwin, *Constitutional Law in 1919-1920. I*, 14 Am. Pol. Sci. Rev. 635, 642-643 (1920); David Fellman, *The Diminution of Judicial Salaries*, 24 Iowa L. Rev. 89, 99-101 (1938); James Parker Hall, Comment on Recent Cases, 20 Ill. L. Rev. 376, 377 (1925); Charles L.B. Lowndes, *Taxing Income of the Federal Judiciary*, 19 Va. L. Rev. 153, 159-160 (1932); Comment, *Further Limitations Upon Federal Income Taxation*, 30 Yale L.J. 75, 78-80 (1920); Recent Case, 3 U. Chi. L. Rev. 141, 142-143 (1935); Recent Case, 43 Harv. L. Rev. 318 (1929); Recent Case, *Federal Taxation of Judicial Compensation*, 7 Va. L. Rev. 69, 72 (1920); see also Recent Important Decision, 18 Mich. L. Rev. 697, 698 (1920) (agreeing with lower court's decision in *Evans*).

"to avoid, at least in part, the consequences of" *Evans* by making the tax applicable only to the salaries of judges appointed after its effective date. See *id.* at 280. But the Court plainly adopted the understanding of the Compensation Clause set forth in Justice Holmes's dissent in *Evans*, that the Clause does not insulate judges from sharing with others the ordinary burdens of citizenship. "[J]udges are also citizens," the Court explained, and "their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *Id.* at 282.

The Court reexamined *O'Malley*, *Miles*, and *Evans* in *United States* v. *Will*, 449 U.S. 200 (1980). In *Will*, the Court held that Congress may not withdraw an increase in statutory judicial salaries once it has gone into effect, but that Congress may cancel a prospective statutory salary increase before it takes effect. The Court held that even a nondiscriminatory diminution of statutory judicial salaries (along with other government employees' salaries) violates the Compensation Clause. *Id.* at 226. In so holding, however, it distinguished the case of taxation of judicial salaries, and reaffirmed its holding in *O'Malley* that nondiscriminatory taxation of judicial salaries does not violate the Clause because "[f]ederal judges, like all citizens, must share the material burden of the government." *Ibid.* (internal quotation marks omitted). The Court in *Will* also disapproved the district court's reliance on *Evans* as a basis for holding that the rescission of a salary increase before its effective date

reduces the amount of compensation that a judge has been promised. See *id.* at 227. Rather, the Court stated:

> In *O'Malley* v. *Woodrough*, 307 U.S. 277 (1939), this Court held that the immunity in the Compensation Clause would not extend to exempting judges from paying taxes, a duty shared by all citizens. The Court thus recognized that the Compensation Clause does not forbid everything that might adversely affect judges. The opinion concluded by saying that to the extent *Miles* v. *Graham*, 268 U.S. 501 (1925), was inconsistent, it "cannot survive." 307 U.S. at 282-283. Because *Miles* relied on *Evans* v. *Gore*, *O'Malley* must also be read to undermine the reasoning of *Evans*.

Id. at 227 n.31.

c. Not only has the Court adopted the position of Justice Holmes's dissent in *Evans*, that federal judges are not constitutionally immune from paying "the taxes that all other men have to pay," 253 U.S. at 265, but it has expressly repudiated the intergovernmental tax immunity decisions on which *Evans* heavily relied (see p. 19, *supra*). See *South Carolina* v. *Baker*, 485 U.S. 505, 520, 524 (1988) (overruling *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U.S. 429 (1895)); *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 486 (1939) (overruling *Collector* v. *Day*, 78 U.S. (11 Wall.) 113 (1871)); see also *Jefferson County* v. *Acker*, 527 U.S. 423, 436-437 (1999); *Davis* v. *Michigan Dep't of the Treasury*, 489 U.S. 803, 811 (1989) (noting overruling of "*Dobbins-Day*" line of cases).

In particular, in *Graves*, decided the same Term as *O'Malley*, the Court emphasized that the proper purpose of a limited intergovernmental tax immunity—such as that recognized in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316 (1819)—is "not to confer benefits on [government] employees by relieving them from contributing their share of

the financial support of the other government, whose benefits they enjoy, * * * but to prevent undue interference with one government by imposing on it the tax burdens of the other." 306 U.S. at 483-484. The Court held in *Graves* that a nondiscriminatory state income tax that falls on federal employees as well as others does not "impose a burden on the national government tantamount to an interference by one government with the other in the performance of its functions." *Id.* at 480-481. And as Justice Frankfurter stressed in his concurring opinion in *Graves*, subjecting individual government officials to nondiscriminatory income taxation does not imperil the independence of the institutions for which those officials work; the flaw of the broader intergovernmental tax immunity doctrine recognized in cases such as *Collector* v. *Day* was that "[f]ailure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other." *Id.* at 490. *Evans* suffered from the same flaw in reasoning: it erroneously transmuted Congress's failure to exempt federal judges from the general income tax into a danger to the independence of the institution of the federal judiciary.

d. *Evans* also claimed support in state court decisions interpreting similar state constitutional provisions (253 U.S. at 256), a private letter from Chief Justice Taney to Treasury Secretary Salmon Chase (*id.* at 257), and an opinion of Attorney General Hoar (*id.* at 258). Closer examination reveals that those sources lend *Evans* little support.

(i) The weight of state court cases supports Justice Holmes's position that a constitutional prohibition against diminution of judicial salaries does not grant judges immunity from generally applicable, nondiscriminatory taxes. In the first such state case of which we are aware, *Commissioners of Northumberland County* v. *Chapman*, 2 Rawle 73 (Pa.

1829), the Pennsylvania Supreme Court ruled that that State's 1790 constitution, which provided that the compensation of the judges of the courts of common pleas "shall not be diminished during their continuance in office," Pa. Const. of 1790, Art. 5, § 2, was not violated by the application to a judge of a tax on "all offices and posts of profit." *Chapman*, 2 Rawle at 73, 77. The court explained that "there is no reason to exempt a judge from contribution," and that, although the legislature "could not constitutionally retrench a part of a judge's salary under the pretext of assessing a tax on it," for the "*bona fide* purpose of contribution, a reasonable portion of it, like any other part of his property, may be applied to the public exigencies." *Id.* at 77. At least five other state supreme courts subsequently upheld the application of income taxes to state judges' salaries against similar constitutional objection. While the reasoning of the decisions varies somewhat, all of them rejected or expressed strong doubt about the proposition that a protection against diminution of salary grants judges an immunity from the duty to pay taxes that are imposed on other citizens generally.[12]

---

[12] See *du Pont* v. *Green*, 195 A. 273, 276 (Del. 1937) (noting that "we express a preference for the dissenting views in *Evans* v. *Gore*, as delivered by Mr. Justice Holmes and concurred in by Justice Brandeis," that there is "no attack on the independence of a Judge by requiring him to pay a tax that all other men had to pay, regardless of their rank or station"); *Taylor* v. *Gehner*, 45 S.W.2d 59, 60 (Mo. 1931) (observing that the State's equivalent to the Compensation Clause "is one of the checks and restraints imposed to secure the independence of the judiciary. It is not a tax exemption provision."); see also *State ex rel. Wickham* v. *Nygaard*, 150 N.W. 513, 515 (Wis. 1915) (remarking that the proposition "[t]hat the framers of our Constitution intended to exempt public officers from any part of the burden of taxation which might be imposed generally on the body of the taxpayers of the state for the support of the government and the benefit of the public, including the office holders, may well be doubted"); *Poorman* v. *State Bd. of Equalization*, 45 P.2d 307, 312-315 (Mont. 1935) ("[I]t is idle to say that because of this prohibition [against diminution of salaries] an official can refuse to pay any species of tax whatever from his acquisitions by way of salary"; expressing preference for dissent in *Evans* and reasoning of *Taylor* and *Wickham*, *supra*); *Martin* v. *Wofford*, 107 S.W. 2d 267, 271 (Ky. 1937) (observing that "[t]he Constitution deals with [public officials'] compensation as compensations and not as exemptions of public officials from any tax that is levied on any other citizen").

A few state court decisions did invalidate certain taxes as applied to judicial salaries, but those decisions are of uncertain weight at best.[13] Only the North Carolina Supreme Court, in *Long* v. *Watts*, 110 S.E. 765 (1922), definitively invalidated the application of a general state income tax to judicial salaries, but that decision has little persuasive force in interpreting the federal Constitution because the court expressly stated that its reasoning exempted from taxation

---

[13] In *Commonwealth ex rel. Hepburn* v. *Mann*, 5 Watts & Serg. 403 (1843), a decision noted in *Evans* (253 U.S. at 256), the Supreme Court of Pennsylvania invalidated under that State's 1838 constitution an income tax imposed solely on salaries of state officials (see 5 Watts & Serg. at 405), not a generally applicable income tax. The effect of that decision was, moreover, repudiated when Pennsylvania amended its constitution in 1873 to delete the prohibition against diminution of judicial salaries. See Pa. Const. of 1873, Art. 5, § 18; see also Pa. Const. Art. 5, § 16 (currently permitting nondiscriminatory diminution of judicial salaries). Similarly, the Maryland Court of Appeals, relying on *Evans* and *Miles*, invalidated the application of the state income tax to judicial salaries, see *Gordy* v. *Dennis*, 5 A.2d 69 (Md. 1939), but that decision was repudiated the very next year, when Maryland amended its constitution expressly to permit the imposition of a nondiscriminatory income tax on judicial salaries, see Md. Const. Art. 3, § 35A. The Louisiana Supreme Court invalidated the City of New Orleans' attempt to tax the salary of a state supreme court justice, see *New Orleans* v. *Lea*, 14 La. Ann. 197 (1859), but the nature of the tax in that case is not clear from the court's summary decision. The Alabama Supreme Court, in an advisory opinion, stated that a state occupation tax levied on the salaries of state and county officers (not a generally applicable tax) would be invalid as applied to judicial salaries. See *In re Opinions of the Justices*, 144 So. 111 (Ala. 1932).

judges who took office after the tax statute was enacted (*id.* at 771)—precisely the holding of *Miles* that this Court overruled in *O'Malley*.

(ii) The Court observed in *O'Malley* (307 U.S. at 281 & nn. 6, 8) that "English-speaking courts" abroad interpreting similar prohibitions against diminution of judicial salaries rejected the reasoning of *Evans* as authority for construing those restrictions to prohibit the application of income taxes on judicial pay. See *Krause* v. *Commissioner for Inland Revenue*, 1929 A.D. 286 (S. Afr.); *The Judges* v. *Attorney-General for Saskatchewan*, 53 Times L.R. 464 (P.C. 1937); see also *Cooper* v. *Commissioner of Income Tax for Queensland*, (1907) 4 C.L.R. 1304 (Austl.). Those tribunals rejected the view taken in *Evans* that the application of a general tax to judicial salaries threatens judicial independence. As Justice Barton of the High Court of Australia observed in *Cooper*, "[o]ne does not think of a Colonial Treasurer trying to levy a tax on the whole people, yielding many hundreds of thousands of pounds, for the mere purpose of vindictively obtaining a few pounds from one or half a dozen Judges." *Id.* at 1319-1320. Similarly, Justice Stratford of the South African Appellate Division observed in *Krause* that "[i]t is indeed difficult to appreciate in what manner a judge's independence of action is attacked by having to contribute, with all other citizens * * * , towards the maintenance of good order and government of the State in which he lives." 1929 A.D. at 295.

Justice Stratford also forcefully rejected *Evans*' assumption "that income tax has the 'effect' of diminishing the salary." *Krause*, 1929 A.D. at 295-296.[14] Similarly, in

[14] Indeed, Justice Stratford remarked that, "[b]ut for a decision of the Supreme Court of the United States in *Evans* v. *Gore* I venture to think that the idea would not readily occur to any judge." *Krause*, 1929 A.D. at 294-295 (citation omitted). Justice Stratford also observed that judges' salaries had been "very much lessened in value by the [British] Imperial Government's action in departing from the gold standard," and that the British Government's actions had therefore, "in effect, diminished" judges' salaries, but he rejected the notion that the indirect effect of the departure from the gold standard upon judicial pay amounted to an improper diminution in judicial compensation; "the judges suffered with the rest of the community and it would be fantastic to think that their independence was affected by the general financial policy of the Imperial Government." *Id.* at 296. Justice Wessels, although not reaching the question, stated that he "very much doubt[ed]" the proposition that "the income tax payable on a judge's salary is a diminution of his remuneration." *Id.* at 290.

Cooper, Justice O'Connor concluded that the "ordinary sense" of the prohibition against diminution of judicial compensation did not prohibit the application of income taxes to such salaries as long as "the full amount of statutory salary has been paid [to the judge] by the Government," and he rejected the argument that under the prohibition a judge "is entitled to have his salary exempted from any general scheme of taxation of incomes." 4 C.L.R. at 1323.

(iii) In *Evans*, the Court noted that, after passage of the income tax act of 1862, Chief Justice Taney wrote to Secretary Chase, objecting on constitutional grounds to the application of the tax to judicial salaries. 253 U.S. at 257-258; see 157 U.S. 701-703 (reprinting Taney letter). As the Court subsequently observed in *O'Malley*, however, in doing so Chief Justice Taney "merely gave his extra-judicial opinion, asserting at the same time that the question could not be adjudicated." 307 U.S. at 280. Chief Justice Taney, moreover, simply asserted that the tax act "diminishes the compensation of every judge three per cent, and if it can be diminished to that extent by the name of a tax, it may in the same way be reduced from time to time at the pleasure of the legislature." 157 U.S. at 701. He did not consider the forceful point that a legislature is unlikely to enact a generally applicable tax for the purpose of threatening judicial independence.

Evans also stated (253 U.S. at 258) that in 1869, Attorney General Hoar adopted Chief Justice Taney's position that the income tax could not be constitutionally applied to the salaries of Article III judges or the President.[15] See 13 Op. Att'y Gen. 161, 161-164 (1869). But that opinion, like *Evans*, relied squarely (*id.* at 162) on this Court's intergovernmental tax immunity decision in *Dobbins* v. *Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842) which has since been overruled. See pp. 19, 22-23. A more sound approach to the question is set forth in a 1919 opinion of Attorney General Palmer, see 31 Op. Att'y Gen. 475, 475-489 (not cited in *Evans*), which concluded that the Compensation Clause "protect[s] the salaries which [judges] shall receive, but [does] not, in any way, limit the power of Congress to create tax burdens to be borne by all citizens alike." *Id.* at 484.

e. In sum, *Evans* has not withstood closer examination and the test of time. Accordingly, that decision, and its reasoning which construes the application of a nondiscriminatory income tax to judicial pay as an impermissible diminution of the compensation that judges are due under Article III, should be disapproved.

2. *The Diminution Of Judicial Compensation Prohibited By Article III Is A Reduction In Judges' Salary Stated In Law, Not A Decrease In Their Effective Take-Home Pay Net Of Taxes*

The court of appeals in this case attempted to reconcile *Evans* and *O'Malley* by reading *Evans* to hold that Congress may not impose *new* taxes on the salaries of already sitting federal judges (even if those taxes do not discriminate against judges), even though under *O'Malley*, "nondiscriminatory taxation of a judge who took office after the tax

[15] As discussed at pp. 30-31, *infra*, the Constitution prohibits any increase or decrease in the compensation of the President during his term of office. See U.S. Const. Art. II, § 1, Cl. 7.

went into effect does not violate the Compensation Clause." Pet. App. 64a (emphasis omitted). The court's reasoning was that, in the former case, the already sitting judge's compensation is "diminish[ed]" by the effect of the new tax, while in the latter case, "the taxation formed part of that judge's compensation scheme from the outset of his tenure." *Ibid.* Respondents have advanced the same interpretation of the Compensation Clause. See Br. in Opp. 17-20.

As we have explained (pp. 18-19, *supra*), this focus on taxation of the compensation of sitting judges, as opposed to those appointed after the taxing statute was enacted, was not part of the Court's rationale in *Evans*. In any event, the interpretation of the Compensation Clause advanced by respondents and reflected in the court of appeals' opinion is erroneous: the Clause does not bar Congress from applying nondiscriminatory taxes to the salaries of already sitting federal judges. Respondents do not argue that Congress has ever literally diminished their stated salary.[16] Respondents argue, rather, that the undiminished "Compensation" that is guaranteed to Article III judges is their take-home pay net of taxes, and so an increase in taxes applicable to their salaries equals an "effective" diminution of their compensation. The text of the Constitution and practicalities of tax administration refute that contention, and the policies of the Clause offer it no support.

a. First, respondents' construction suffers from serious textual flaws. A major problem in respondents' argument is the relation between the Judges' Compensation Clause and the President's Compensation Clause, Art. II, § 1, Cl. 7, which provides that the President shall "receive for his Services, a Compensation, which shall neither be *encreased* nor *diminished* during the Period for which he shall have been

[16] To the contrary, since 1984, Congress has enacted substantial salary increases for federal judges. See p. 8 n.6, *supra*.

elected."[17] (Emphasis added.) Under respondents' theory, Congress could not eliminate any tax on the President's salary while he was in office, even if that elimination were applicable to all citizens, because such an action would "encrease[]" the President's effective compensation net of taxes. We see no reason, however, why the Constitution would require Congress to discriminate against the President by denying him tax relief that it provides to all other individuals.[18]

---

[17] The background to the adoption of the Constitution confirms the similar purpose of the two Clauses. Both were intended to ensure independence from Congress. Compare *The Federalist* No. 73, at 441-442 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (because of the President's Compensation Clause, the legislature "can neither weaken his fortitude by operating upon his necessities, nor corrupt his integrity by appealing to his avarice") with *The Federalist* No. 79, at 472 (Alexander Hamilton) ("The remark made in relation to the President is equally applicable here. In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*"). The principal difference is that the Constitution permits increases in judicial salaries but not in the salary of the President during his term of office. The Framers permitted increases in judicial compensation in the discretion of Congress in part because of the possibility that inflation might lessen the value of a judge's salary during his life tenure. The President's compensation, by contrast, did not present that problem, because the President is elected for only a four-year term. See *id.* at 473; *Will*, 449 U.S. at 219-220. It is notable, however, that the Framers did not *require* Congress to raise judicial salaries to keep pace with inflation, even though they plainly understood that a decline in the value of money could effectively diminish the buying power of a judge's salary. See *Atkins* v. *United States*, 556 F.2d 1028, 1047-1051 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978). That point casts significant doubt on respondents' theory that the "Compensation" protected from diminution by Article III is a judge's "effective" compensation rather than the statutory salary payable to judges.

[18] Attorney General Palmer noted this very point in his 1919 opinion, observing that "[i]f to impose an income tax is to diminish [the President's] salary, to repeal a tax in force at the beginning of his term would equally be to increase it." 31 Op. Att'y Gen. at 488. He further observed

Similarly, the Twenty-seventh Amendment provides that "[n]o law, varying the compensation for the services of the Senators and Representatives, shall take effect, until an election of Representatives shall have intervened." U.S. Const. Amend. XXVII.[19] Under respondents' construction of "Compensation" as "compensation net of income taxes," Congress could not impose new (or repeal old) taxes on its own Members' salaries until an election of Representatives had intervened, even if it did so with respect to the general population, because such an action would "vary[] the compensation" of Senators and Representatives. Respondents' textual analysis therefore leads to the conclusion that, when Congress imposes new income taxes on the general population, it is constitutionally required to discriminate in favor of itself by exempting its Members from those taxes. This implausible result demonstrates that respondents' reading of the Compensation Clause cannot be sustained.

b. Respondents' construction of Article III would also lead to serious practical difficulties in tax administration. If

---

that, if the Constitution indeed prohibited the imposition or repeal of generally applicable taxes on the President's salary during his term of office, then President Wilson was constitutionally required to continue to pay the tax levied by the 1916 income tax act, even though "that Act has since been repealed and no one else in the country now pays the tax." *Ibid.* The "extreme improbability" of such a result, he reasoned, supported the conclusion that "it was never intended that the amount which [the President and Article III judges] should receive as compensation should be regarded as affected in any way by the amount of income taxes imposed upon them, in common with other citizens, either before or during their terms of office." *Ibid.*

[19] The Twenty-seventh Amendment, which became effective in 1992, was proposed to the States by the First Congress and was first introduced in the House of Representatives by James Madison, who obviously was familiar with the Framers' understanding of the term "Compensation" as used in the Constitution. See 1 *Debates and Proceedings in the Congress of the United States* 448, 450, 452, 457, 756-757 (Joseph Gales comp., 1789).

respondents were correct that "Compensation" in Article III means the effective take-home pay net of income taxes, then it is difficult to understand why Congress would not also be prohibited from raising the *rates* of income taxes on the salaries of sitting judges.[20] If the application of a new income tax to judicial salaries would "diminish" a judge's compensation, so, it would seem, would an increase in the rate of such an income tax. Either action reduces the amount that the judge takes home in pay, even when the judge's statutory salary remains unchanged. But that construction, if accepted, would require Congress to apply differing income tax rates (and perhaps differing deductions, exemptions, and credits) to judges, depending on the date of their appointment. The application of such a system of income tax to judicial salaries would be extraordinarily unwieldy.[21]

Respondents have maintained (Br. in Opp. 29) that there is a difference of constitutional significance between a new

---

[20] Because Congress is also prohibited from adjusting the compensation of the President and Members of Congress during the terms of office of the President or of Representatives, respectively (see pp. 29-31, *supra*), Congress might also be prohibited from *raising or lowering* the rates of income taxes on the salaries of the President and all Members of Congress, even as part of a general increase or decrease in tax rates.

[21] Under such a rule, Congress would essentially be required (a) to freeze the effective rate of any tax applicable to judicial salaries to the effective rate in force when each judge received the judicial commission, (b) to subject all federal judicial salaries only to the lowest effective income tax rate that was applicable when any sitting member of the judiciary first took office, or (c) to exempt federal judges from income taxes altogether (and to do so permanently, since any new application of an income tax to judicial salaries would violate the Compensation Clause as to sitting judges and would create the problems just discussed for judges appointed in the future). In addition, no change in tax rates could be applied to the salaries of the President and Members of Congress until a new election for President or for Representatives, respectively. Nothing in the text or background of the Compensation Clause remotely suggests that the Framers intended to relegate Congress to such a welter.

income tax and an increased income tax rate, but they do not explain why or how the Constitution could distinguish between the two, if they are correct in their initial premise that the imposition of a generally applicable tax constitutes a diminution in a judge's compensation.[22] Indeed, it is not clear that respondents can distinguish Social Security taxes from the income tax on that basis, for Social Security taxes on employees are merely a kind of income tax. See 26 U.S.C. 3101(a) and (b) (imposing OASDI and HI taxes "on the income of every individual"). Moreover, Congress has frequently imposed surtaxes on income that might be characterized either as a new income tax or an increase in the rate of income taxes.[23] Respondents' construction of the Compensation Clause offers no guidance about the proper treatment of such taxes.

c. Respondents' submission also finds little support in the underlying policies of the Compensation Clause. This Court has remarked that the Clause has two objectives: to preserve the independence of the judiciary from "potential domination by other branches of government," *Will*, 449 U.S. at 218, and to "attract able lawyers to the bench" by assuring them certain support, *id.* at 221. It is difficult to conceive,

---

[22] Respondents may suggest that a judge who takes office after an income tax has been enacted is effectively on notice that Congress may subsequently increase the rate of that tax. But it is also true that judges, like all citizens, are on notice that Congress may impose new forms of taxes on income, given that such taxes are specifically authorized by the Sixteenth Amendment. That point distinguishes this case from *Evans*, because Judge Evans took office during a period in which the income tax was deemed unconstitutional. See *Jefferson County* v. *Acker*, 210 F.3d 1317, 1321 (11th Cir. 2000), petition for cert. pending, No. 00-455.

[23] See, *e.g.*, War Revenue Act, ch. 63, §§ 1, 2, 40 Stat. 300-301; Revenue Act of 1918, ch. 18, § 211, 40 Stat. 1062-1064 (1919); Revenue Act of 1942, ch. 619, § 172(a), 56 Stat. 884; Revenue Act of 1951, ch. 521, 65 Stat. 459-461; Revenue and Expenditure Control Act of 1968, Pub. L. No. 90-364, § 102, 82 Stat. 251-254.

however, how Congress's extension of the generally applicable, nondiscriminatory OASDI and HI taxes to judicial salaries—along with the salaries of numerous federal officials and employees—could have posed any threat to judicial independence. Certainly Congress is unlikely to establish a new, generally applicable tax on incomes for the purpose (or with the likely effect) of endangering the independence of the judiciary. See pp. 26-28, *supra*. Thus, if Congress had brought judges within the Social Security system at the same time that it extended that system to most wage-earners, there could have been no serious contention that Congress was threatening judicial independence.[24] That is particularly true since Congress also extended to federal judges the opportunity to earn credits for OASDI and HI benefits based on their judicial service, an opportunity they had not previously had.

Respondents' argument, therefore, is that Congress could not do in two steps what it could have done at one time—enact the Social Security system first for private-sector employees, and then extend it to federal employees as well. Thus, they contend, because Congress initially exempted judges from OASDI and HI taxes, it was required to maintain that exemption permanently for judges who were in office before the taxes were further extended. But, as the Court of Federal Claims observed, there is "no good

[24] It is likely that political constraints on the imposition of taxes on the population at large effectively prevent Congress from using generally applicable, nondiscriminatory taxes to impair the independence of the judiciary. Any generally applicable income tax affects a very large number of people, and so the general public is likely to object to an onerous tax imposed for the purpose of punishing a small number of judges. The same political constraints, however, might not constrain Congress's power to fix the statutory salary of judges, in the absence of the Compensation Clause, since that power affects only a small number of individuals and not the general public. Indeed, reductions in judges' statutory salary might well escape general public notice.

reason why Congress in taxing judges has the power to accomplish wholesale what it cannot do piecemeal." Pet. App. 45a. Indeed, "the purpose of the Compensation Clause is not to make irrevocable every momentary tax exemption enjoyed by sitting judges relative to the public; its purpose is rather to protect the independence of the judicial branch by insuring that judges are shielded from attempts by the political branches to impose economic duress." *Ibid.*

Respondents argue, however (Br. in Opp. 20), that the extension of OASDI and HI taxes to their judicial salaries made their judicial positions relatively less attractive because, when they left the private sector, they expected that their judicial salaries (unlike their private-sector salaries) would be free of Social Security taxes. They maintain that the application of new taxes in such a manner deters qualified persons from assuming judicial positions. But respondents overlook the significant benefit that many sitting and future judges obtained in 1983 and 1984 by becoming eligible for OASDI and HI coverage based on their judicial service.[25] Indeed, although respondents have objected to the imposition of OASDI and HI taxes on their salaries, they have never suggested that they would waive the right to receive OASDI and HI benefits based on their coverage in judicial service in return for exemption from OASDI and HI taxes. Moreover, respondents have pointed to no evidence suggesting that the OASDI and HI taxes caused federal judges to leave judicial service; indeed, they have not even

[25] The eligibility for HI coverage is particularly significant, because, unlike OASDI benefits, HI benefits do not depend on the amount that an employee has earned or the length of time he or she has worked, as long as the employee has accrued sufficient quarters of coverage. Any employee has sufficient quarters of coverage is entitled to the full range of HI benefits available under the law.

alleged that any of them left the bench because of those taxes.[26]

More fundamentally, whereas a prohibition against diminution in judges' statutory salary may be necessary to assure them a reasonable certainty of support, a prohibition against taxation is not. If the Constitution did not prohibit Congress from reducing judges' statutory salaries, judges might well fear that Congress would exercise its discretion over their salary to reduce them to penury, without political objection from the general public. But a judge who is assured of a certain statutory salary, as respondents are, also knows that his rate of taxation will be no greater than that of similarly situated members of the general public, and that the general public will object to onerous income tax rates. Thus, while judges, like all members of the public, are subject to income taxes, they also have, like all members of the public, protection in the political system against excessively burdensome income taxes.

---

[26] Cf. *Atkins*, 556 F.2d at 1055 (rejecting argument that Congress's failure to increase judicial salaries to match inflation violated Compensation Clause, absent a "demonstration of massive resignation for financial reasons").

B. Congress's Extension Of Social Security Taxes To Judicial Salaries Did Not Impermissibly Discriminate Against Article III Judges

Respondents have argued (Br. in Opp. 22-24) that Congress unconstitutionally discriminated against federal judges when it extended Social Security taxes to their salaries.[27] That contention is without merit. When Congress extended HI and OASDI taxes to the salaries of Article III judges and federal employees, it merely brought taxation of those salaries in line with the treatment of the vast majority of other wage-earners in this country.[28]

---

[27] Although we have argued that the application of nondiscriminatory income taxes to judicial salaries does not violate the Compensation Clause because the Constitution's reference to "Compensation" is only to judges' stated salary, we assume that discriminatory taxation of judges would contravene fundamental principles underlying Article III, if not the Clause itself.

[28] Respondents have noted (Br. in Opp. 22) that a small minority of wage-earners still remain outside the Social Security system. See generally 26 U.S.C. 3121(b) (1994 & Supp. IV 1998) (setting forth various exceptions to coverage, including such persons as Bahamian temporary agricultural workers, student nurses, and teenagers delivering newspapers). In addition, Congress originally did not compel the participation of employees of state and local governments in the OASDI program, out of concern about the intergovernmental tax immunity doctrine and recognition that some state and local governments operate retirement programs similar to CSRS. In 1950, Congress established a system whereby state and local governments could elect to have certain of their employees covered by the OASDI program under agreements with the federal government. See *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 44-46 (1986); 42 U.S.C. 418; Social Security Act Amendments of 1950, ch. 809, § 106, 64 Stat. 514. In 1986, Congress required HI coverage of almost all new employees of state and local governments. See Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 13205, 100 Stat. 313-318 (1986). And in 1990, Congress required OASDI coverage of essentially all employees of state and local governments who are not covered by a state retirement system

Respondents object (Br. in Opp. 23), however, that Congress did not also require all federal employees who were already then in service to pay the OASDI tax.[29] Congress was aware, however, that most incumbent federal employees were already required to make salary contributions to a separate retirement system, the CSRS, which had been in place since 1920. See pp. 3, 6-7, *supra*. Terminating CSRS immediately would have been extremely disruptive of federal employees' retirement plans. On the other hand, requiring federal employees to contribute to both Social Security and CSRS would have subjected those employees to a mandatory double deduction under federal law. Congress therefore allowed incumbent federal employees to remain in CSRS rather than the OASDI program and to receive a CSRS annuity (but not OASDI benefits) based on their federal employment. In doing so, Congress treated incumbent federal employees as equally as possible to all other wage earners, who are also subject to only one imposition under federal law for retirement income security, the

---

similar to CSRS or who are not covered by OASDI pursuant to an agreement under 42 U.S.C. 418. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11332(b), 104 Stat. 1388-469; 26 U.S.C. 3121(b)(7)(F). The great majority of state and local employees are now covered by the OASDI and HI programs. See H.R. Rep. No. 25, 98th Cong., 1st Sess. 17-19 (1983).

Although about 10% of the civilian labor force remains outside the OASDI system, that hardly establishes that the imposition of Social Security taxes on judges' salaries is discriminatory. The taxes are surely generally applicable to most citizens, even if they are not *universally* applicable to all persons employed in the United States.

[29] Respondents' discrimination argument does not apply to the HI tax, because all federal civilian employees were required to pay that tax after January 1, 1983. J.A. 61. Most employees of state and local governments have also been required to pay HI taxes since 1986. See 26 U.S.C. 3121(u)(2)(A); S. Rep. No. 146, 99th Cong. 1st Sess. 389-391 (1985); H.R. Rep. No. 241, 99th Cong., 1st Sess. Pt. 1, at 25-27 (1985).

OASDI tax. Federal judges, however, were not subject to any similar civil-service retirement contribution, because judges are guaranteed a lifetime annuity after retirement at taxpayer expense. See 28 U.S.C. 371 (1994 & Supp. IV 1998). Congress therefore had no occasion to permit judges to "opt out" of the OASDI program.

Respondents also point out (Br. in Opp. 5-7) that, when Congress extended OASDI taxes to judicial salaries, it allowed a small number of high-level federal officials and employees to opt out of CSRS, thereby (respondents contend) permitting those persons effectively to offset the incidence of the new OASDI taxes on their salaries. But if Congress had required those federal officials to continue contributing to both CSRS and the OASDI program, they would have been subject to a double imposition. Moreover, Congress did not allow those high-level officials and employees to opt out of OASDI; it required them (like Article III judges) to pay OASDI taxes, and made the second payment (the CSRS contribution) optional. Judges were not covered by CSRS, and thus had no cause to complain of paying double retirement contributions.

There is therefore no basis for a conclusion that Congress impermissibly discriminated against federal judges by bringing them within the coverage of the OASDI program and requiring them to pay OASDI taxes. While it is true that Congress in 1984 allowed other incumbent federal employees to alleviate the effect of the extension of the OASDI tax to government employees' salaries, that is only because those other employees were already required under federal law to contribute to a program that, like OASDI, financed a retirement income security program. Federal judges had not previously been required to make contributions to such a program through salary contributions. By declining to grant federal judges an exemption or setoff from OASDI taxes, Congress did not discriminate against them; rather, it

equalized, as nearly as possible, the treatment of contributions from their salaries for retirement income security purposes with that of all other employees, federal and otherwise.

II. ANY CONSTITUTIONAL VIOLATION TERMINATED WHEN CONGRESS INCREASED THE STATUTORY SALARIES OF FEDERAL JUDGES IN AN AMOUNT GREATER THAN THE OASDI AND HI TAXES DEDUCTED FROM THOSE SALARIES.

In 1984, after Congress extended OASDI taxes to judicial salaries, Congress also granted federal judges an increase in salary that exceeded the amount of those taxes. See Pet. App. 86a-87a; pp. 8, 11-12, *supra*. The Court of Federal Claims concluded that that increase in judicial salaries terminated any Compensation Clause violation caused by the taxes' diminution of judges' take-home pay. Pet. App. 78a-89a. The court of appeals, however, held that the unconstitutional diminution in judicial compensation continued even after Congress elevated judges' effective take-home pay above its level before the extension of Social Security taxes to judges' salaries. The court of appeals analyzed the issue in terms of whether the salary increase was sufficient to pay the "damages" caused by what it believed to be an ongoing violation of the Compensation Clause resulting from the assessment of OASDI and HI taxes each month, rather than whether the increase in salary terminated the violation altogether. Viewing the matter from that perspective, the court reasoned that the measure of damages for a Compensation Clause violation is "independent of any generally awarded adjustment to judicial salaries." Pet. App. 125a. That ruling cannot be reconciled with the text or policies of the Clause.

The Compensation Clause provides that federal judges shall "receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." Even if Congress had "diminished" the compensation of sitting judges when it imposed HI and OASDI taxes on their pre-existing salaries, that "diminution" would have come to an end when Congress raised those judges' salaries in an amount greater than the amount of the taxes imposed on their pre-tax salaries. Congress could be said to have "diminished" a judge's compensation only if it left the judge with less compensation than he received before the tax took effect. Cf. *Will*, 449 U.S. at 226-229 (holding that Congress did not unconstitutionally diminish judges' salaries when it canceled salary adjustments before their effective date). To be sure, the increase in the respondents' net pay was smaller than it would have been if the HI and OASDI taxes had not been withheld. But the Compensation Clause prohibits Congress only from *decreasing* judicial compensation; Congress has discretion to decide what *increases* in compensation should be given. See *id.* at 227.

The facts of this case are similar to the termination of the Compensation Clause violation in "Year 1" of the facts of *Will*. In Year 1, judges initially were granted a 4.8% annual salary increase for the fiscal year, pursuant to a recommendation of the Advisory Committee on Federal Pay and an Executive Order. Congress, however, enacted a statute rescinding that increase, which the President signed on the first day of the fiscal year, after the increase had taken effect. See 449 U.S. at 204-206, 224-225. Although the Court found a Compensation Clause violation in that rescission of the 4.8% salary increase, it also noted that Congress, later in that fiscal year, enacted a statutory increase in judges' salaries that exceeded the salaries that judges would have received had Congress left in effect the initial 4.8% increase. *Id.* at 206 n.3, 209 n.6. It was unquestioned in *Will* that

Congress's subsequent increase in judicial salaries terminated the violation caused by the rescission of the 4.8% increase. *Ibid.* The Court did not suggest that Congress was obligated to continue to pay to the judges who held office at the beginning of Year 1 the rescinded 4.8% increase *in addition to* the subsequently enacted statutory increase—yet that is essentially respondents' position here.

The court of appeals believed that the Compensation Clause violation in this case continued independent of any general judicial salary increases because, in its view, a different rule would create two classes of judges: those appointed after the taxes were extended to judicial salaries, who would enjoy the full extent of the general salary increases, and those appointed before application of the taxes, who would be required to pay "out of their own salaries, including generally-granted increases, the damages owed to them by the Government." Pet. App. 122a.[30] But once Congress increased judicial salaries above the level that existed before the incidence of the tax, there was no more diminution and hence no more violation of the Compensation Clause for which damages might be owed. Moreover, the court of appeals' ruling itself created two classes of judges with different compensation packages: federal judges appointed after the OASDI taxes took effect in 1984 must pay HI and OASDI taxes on their current annual salaries, whereas judges appointed before that date receive a permanent immunity from paying those taxes—even though they are eligible for HI and OASDI benefits based on their judi-

[30] The same, of course, could have been said of Year 1 in *Will*. Judges who were appointed in the six months between the date on which Congress rescinded the 4.8% increase and that on which it enacted the statutory increase would have received the "full benefit" of the statutory increase, whereas judges who were in office before the 4.8% increase was rescinded would not. Yet the Court did not doubt that the constitutional violation terminated when the statutory increase was enacted.

cial service. The court of appeals' decision therefore creates inequities in judicial compensation.

The effect of the court of appeals' ruling on this point is that Congress may never bring to an end a Compensation Clause violation caused by taxation of judicial salaries except by repealing the offending tax (or, perhaps, by granting the affected judges a special salary increase, thereby compensating them differently from all other federal judges). That ruling casts a serious cloud over Congress's authority to extend nondiscriminatory taxes paid by the general population to judicial salaries; if Congress wished to do so, it would have to grant sitting judges a permanent exemption from the tax. That requirement would create inequities among Article III judges and would embed those inequities in the judicial compensation system for long periods of time, in view of the life tenure of Article III judges. Congress could, of course, exempt all judges from new taxes, but that approach would create inequity between Article III judges and all other citizens, as this Court recognized in *O'Malley*, when it said that "judges are also citizens" and do not have "an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." 307 U.S. at 282. Accordingly, should the Court conclude that the Compensation Clause was violated by Congress's extension of OASDI and HI taxes to judicial salaries, it should also hold that the violation was terminated when Congress subsequently increased judicial salaries in an amount greater than the amount of the tax.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

SETH P. WAXMAN
Solicitor General

DAVID W. OGDEN
Assistant Attorney General

EDWIN S. KNEEDLER
Deputy Solicitor General

PAUL R.Q. WOLFSON
Assistant to the Solicitor General

DAVID M. COHEN
DOUGLAS N. LETTER
JEANNE E. DAVIDSON
ANNE MURPHY
Attorneys

NOVEMBER 2000

JAN 5 2001

Supreme Court, U.S.
FILED
JAN 5 2001
CLERK

No. 99-1978

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JUDGE TERRY J. HATTER, JR., *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF FOR RESPONDENTS

STEVEN S. ROSENTHAL
DOUGLAS A. TUCKER
NOEL J. FRANCISCO
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, NW
Washington, DC 20005
(202) 220-9600

W. STEPHEN SMITH*
VICTORIA A. TOMLINSON
MORRISON & FOERSTER, LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
(202) 887-1500
*Counsel of Record

ELLEN E. DEASON
Associate Professor of Law
University of Illinois
504 E. Pennsylvania Ave.
Champaign, IL 61820
(217) 333-1286

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Whether Article III, Section 1 of the Constitution of the United States permits Congress to reduce judicial compensation through the imposition of a new tax that places a discriminatory economic burden on sitting Article III judges.

2. Whether a diminution in the compensation of a limited class of Article III judges in violation of Article III, Section 1 of the Constitution of the United States is remedied by a subsequent increase in the salaries of a wider class of federal employees that was granted for purposes other than to remedy the unconstitutional diminution.

TABLE OF CONTENTS

Page

ADDITIONAL STATUTORY PROVISIONS INVOLVED 1

COUNTER-STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 10

ARGUMENT 14

I. THIS COURT SHOULD AFFIRM ON LIABILITY UNDER THE LAW OF THE CASE DOCTRINE .. 14

II. THE EXTENSION OF SOCIAL SECURITY TAXES TO SITTING ARTICLE III JUDGES VIOLATES THE COMPENSATION CLAUSE 16

A. The Guarantee of Undiminished Compensation is Not Limited to Reductions in Statutory Salary 16

B. The Extension of Social Security Taxes to Sitting Article III Judges Diminishes Judicial Compensation and Thus Falls Squarely Within the Prohibition of the Compensation Clause 26

1. The Extension of Social Security Taxes to Sitting Judges' Compensation Violates the Compensation Clause in the Same Manner as Would a Reduction in Their Statutory Salaries 27

2. The OASDI Deductions Violate the Compensation Clause Because They Discriminate Against Article III Judges 33

TABLE OF CONTENTS – Continued

Page

C. The Government Offers No Persuasive Reason Why the Diminution in the Respondents' Compensation Should Go Unremedied 38

III. SALARY INCREASES GRANTED TO THE ENTIRE JUDICIARY DID NOT REMEDY THE DIMINUTION 45

CONCLUSION 50

TABLE OF AUTHORITIES

Page

CASES:

Agostini v. Felton, 521 U.S. 203 (1997) 14

Atkins v. United States, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) 25, 43

Arizona v. California, 460 U.S. 605 (1983)..... 14

Bowen v. Public Agencies Opposed to Soc. Sec. Entrapment (POSSE), 477 U.S. 41 (1986) 29, 30

Carper v. Stiftel, 384 A.2d 2 (Del. 1977)..... 24

Commonwealth ex rel. Hepburn v. Mann, 5 Watts & Serg. 403 (Pa. 1843) 23

Dobbins v. Commissioners of Erie County, 41 U.S. (16 Pet.) 435 (1842)..... 43

Durant v. Essex Co., 74 U.S. (7 Wall.) 107 (1868) 14

Evans v. Gore, 253 U.S. 245 (1920)..... *passim*

Evans v. Gore, 262 F. 550 (W.D. Ky. 1919), *rev'd*, 253 U.S. 245 (1920) 48

Gordy v. Dennis, 5 A.2d 69 (Md. 1939) 24

Hudson v. Johnstone, 660 P.2d 1180 (Alaska 1983)..... 24

In re Opinion of Justices, 144 So. 111 (Ala. 1932) 24

Jefferson County v. Acker, 210 F.3d 1317 (11th Cir. 2000), *petition for cert. filed*, No. 00-455 (U.S. Sept. 22, 2000)..... 25

Long v. Watts, 110 S.E. 765 (N.C. 1922)..... 23

Milliken v. Bradley, 418 U.S. 717 (1974) 47

Miles v. Graham, 268 U.S. 501 (1925)..... 44

TABLE OF AUTHORITIES – Continued

Page

New Orleans v. Lea, 14 La. Ann. 197 (La. 1859) 23

O'Donoghue v. United States, 289 U.S. 516 (1933)..... 1

O'Malley v. Woodrough, 307 U.S. 277 (1939) ..... *passim*

Purnell v. Page, 145 S.E. 534 (N.C. 1903)..... 23

South Carolina v. Baker, 485 U.S. 505 (1988)..... 43

United States v. IBM, 517 U.S. 843 (1996) 26

United States v. More, 7 U.S. (3 Cranch) 159 (1805) 24

United States v. Pink, 315 U.S. 203 (1942)..... 14

United States v. Will, 449 U.S. 200 (1980) ..... *passim*

CONSTITUTION, STATUTES AND EXECUTIVE ORDERS:

U.S. CONST. art. II, § 1 39

U.S. CONST. art. III, § 1 ..... *passim*

U.S. CONST. amend. XXVII 13, 39, 40

Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 12112, 100 Stat. 313 (1986)..... 7

Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494 (1984) ..... *passim*

Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub. L. No. 98-168, §§ 201-08, 97 Stat. 1106 (1983)..... *passim*

Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986).....*passim*

TABLE OF AUTHORITIES – Continued

Page

Judicial Improvements Act of 1985, Pub. L. No. 99-336, § 2(c), 100 Stat. 633 (1986) 37

Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 (1983) ..... *passim*

Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 (1982) 1

5 U.S.C. 8331, note 1

26 U.S.C. 3121 (1982) 2

28 U.S.C. 44 45

28 U.S.C. 135 45

28 U.S.C. 371(a) 4

28 U.S.C. 371(b) 4

28 U.S.C. 376 37

28 U.S.C. 2109 ..... 9, 14

31 U.S.C. 1301(a) 46

42 U.S.C. 410(a) (1982) 2, 3

42 U.S.C. 426(a)(2)(A) 2

Act of February 25, 1919, ch. 29, 40 Stat. 1156 (1919) 48

Exec. Order No. 12,335, 46 Fed. Reg. 61,633 (Dec. 18, 1981) 2

MISCELLANEOUS:

Debates in the Federal Convention (July 18, 1787) 22

THE FEDERALIST No. 48 (James Madison) 38

TABLE OF AUTHORITIES – Continued

Page

THE FEDERALIST No. 79 (Alexander Hamilton) 11, 20

1 J. KENT, *Commentaries on American Law* (1826) 18, 27

15 JAMES WM. MOORE, MOORE'S FEDERAL PRACTICE 100.05[4][a-b] (Matthew Bender 3d ed. 1999) 31

Charles Gardner Geyh & Emily Field van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 CHI.-KENT L. REV. 31 (1998) 17, 21, 22

RICHARD POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985) 48

Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Compensation*, 24 UCLA L. REV. 308 (1976) 49

Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 PENN. L. REV. 1104 (1976) 17

JAMES WILSON, LECTURES ON LAW (1791), *reprinted in* 4 THE FOUNDERS' CONSTITUTION 162 (1981) 22

H.R. Conf. Rep. No. 98-542 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1625 ..... 5, 29, 35, 37

Report of the National Commission on Social Security Reform (1983) 2-3

BRIEF FOR RESPONDENTS

ADDITIONAL STATUTORY PROVISIONS INVOLVED

Three additional statutory provisions involved in this case, the Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983 (Adjustment Act), Pub. L. No. 98-168, §§ 201-08, 97 Stat. 1105 (1983), the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 1059 (1984), and the Federal Employees' Retirement System Act of 1986 (FERS Act), Pub. L. No. 99-335, 100 Stat. 514 (1986), are set forth at 5 U.S.C. 8331 note and in the Appendix to the Brief for Respondents In Opposition to Petition for Writ of Certiorari (Opp. App. 1a-20a).

COUNTER-STATEMENT OF THE CASE

The Constitution of the United States provides that the compensation of Article III judges "shall not be diminished during their continuance in office." U.S. Const. art. III, § 1. This provision "is designed to benefit, not the judges as individuals, but the public interest in a competent and independent judiciary." *United States v. Will*, 449 U.S. 200, 217 (1980). For this reason, "there rests upon every federal judge affected nothing less than a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation . . . ." *O'Donoghue v. United States*, 289 U.S. 516, 533 (1933).

Recognizing this duty, a group of sixteen Article III judges brought this action against the United States of America. The judges claimed that the United States diminished their compensation in violation of Article III of the Constitution by subjecting their salaries to the Medicare hospital insurance tax in the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), Pub. L. No. 97-248, 96 Stat. 324 (1982), and to the old-age and survivors' disability insurance tax in the Social Security Amendments of 1983 (1983 Amendments), Pub. L. No.

98-21, 97 Stat. 65 (1983), and three related statutes, Opp. App. 1a-20a (collectively, the Social Security Amendments).

This case is now in its twelfth year of litigation. In 1996, this Court entered an order affirming the Federal Circuit's judgment that the enactment of the statutes at issue unconstitutionally diminished the compensation of sitting Article III judges. Since that time, the Respondents and other affected judges have relied on the Court's order as a final determination of the liability question. On remand, the only remaining issue was the quantum of damages owed to the judges. While the government claimed that the judges were entitled to no (or minimal) damages, the *en banc* Federal Circuit unanimously disagreed. The government now seeks reversal of that decision, principally on the ground that the Court should reconsider the 1996 affirmance of the Federal Circuit's judgment on liability.

1. In the early 1980s, Congress became concerned about the integrity of the Social Security old-age, survivors and disability (OASDI) and Medicare hospital insurance (HI) programs (collectively, Social Security). The National Commission on Social Security Reform (Greenspan Commission) was established to study this problem and make recommendations about how to strengthen the programs. *See* Exec. Order No. 12,335, 46 Fed. Reg. 61,633 (Dec. 18, 1981). At the time the Greenspan Commission was established, over 90 percent of the country's 2.7 million federal civilian employees, including federal judges, did *not* participate in Social Security. *See* 42 U.S.C. 410(a)(6)(A) (1982); J.A. 41. Federal judges, along with the vast majority of other federal civilian employees, had been exempted from OASDI by the Social Security Act of 1935 because they were already "covered by a retirement system established by a law of the United States." 26 U.S.C. 3121(b)(6)(A) (1982). Participation in the HI program was generally tied to participation in the OASDI program. 42 U.S.C. 426(a)(2)(A).

The Greenspan Commission recommended that "all *newly hired* civilian employees of the Federal Government" should be added to OASDI (and made subject to OASDI taxes on their salaries) to strengthen the program.[1] It also recommended that all federal civilian employees be added and made subject to HI taxes on their salaries regardless of date of hire. Commission Report at 171. Congress first acted on the Commission's recommendation concerning the Medicare program, and in 1982 made the salaries of virtually all federal civilian employees subject to HI taxes, effective January 1, 1983. Pet. App. 132a. The following year, Congress acted upon the Commission's recommendation concerning OASDI, providing in the 1983 Amendments that federal civilian employees hired *after* December 31, 1983, would be subject to OASDI taxes.

Under the 1983 Amendments, the vast majority of the federal civilian employees hired before 1984 remained exempt from OASDI taxes. The 1983 Amendments did, however, extend OASDI taxes to a small group of federal officials who had entered office before January 1, 1984. These officials were the President and Vice President, certain senior political appointees, Members of Congress, certain legislative branch employees not already covered by the Civil Service Retirement System (CSRS), and federal judges.[2] In sum, less than one-half of one percent of the existing federal civilian workforce (or less than 12,500 employees) were required to pay OASDI taxes as a result of the 1983 Amendments. J.A. 70.[3]

---

[1] Report of the National Commission on Social Security Reform at 2-7 (1983) (Commission Report) (emphasis added).

[2] 42 U.S.C. 410(a)(5)(C)-(G); *see generally* J.A. 43, 53-58. The federal judges in question included all Article III judges, judges of the U.S. Claims Court and U.S. Tax Court, U.S. Magistrates, and U.S. Bankruptcy judges.

[3] The history of the Social Security Amendments, and a careful analysis of the operation and effect of these statutes, is

2. Unlike other federal employees, Article III judges were (and remain) subject to special statutory retirement provisions. After meeting certain age and service requirements, an Article III judge may retire from active service (*i.e.*, assume senior status), but render service as he or she is able. In this event, the judge retains the salary of the office, including increases. 28 U.S.C. 371(b). Alternatively, an Article III judge may retire from office and receive an annuity for the remainder of his or her lifetime equal to the judicial salary at the time of retirement. 28 U.S.C. 371(a). In addition, Article III judges have the option of contributing to the Judicial Survivors' Annuity System (JSAS) to provide for their survivors. 28 U.S.C. 376.

Each Respondent was appointed to the bench prior to the enactment of the Social Security Amendments. Thus, at the time each Respondent decided whether to accept a federal judicial appointment, each understood he would receive the statutory judicial income, and that there would be no deductions for Social Security from this salary. J.A. 87-103. In addition, several took special note of, and relied specifically on, the savings that would result from the provision of statutory retirement benefits without Social Security deductions. *See, e.g.*, J.A. 95, 98, 101-02.

3. Congress recognized that the effect of the 1983 Amendments would be to subject federal civilian employees hired after January 1, 1984, to mandatory withholding for two different retirement programs (*e.g.*, Social Security and CSRS). In order to give these employees economic relief from dual withholding until a new federal retirement system could be created, Congress enacted the Adjustment Act shortly before the 1983 Amendments were to go into effect. Under the "interim plan" of the Adjustment Act, CSRS deductions were

---

contained in the declaration of Respondents' expert Peter R. Lynn, which was submitted in support of their motion for summary judgment on liability. J.A. 59-86.

reduced from 7% to 1.3% of an employee's salary to offset the new 5.7% OASDI deduction. Thus, the total amount deducted from a new employee's salary was no greater than the amount withheld from an existing CSRS employee earning the same salary, even though the new employee was subject to both CSRS and OASDI.

The Adjustment Act also included special provisions for the group of incumbent officials mandatorily added to Social Security on January 1, 1984. Congress recognized that "the rules [were] being changed in the middle of the game" for this group and provided them with choices to harmonize their deductions for retirement programs. Conf. Rep. on Adjustment Act, H.R. Rep. No. 98-542, at 13 (1983), *reprinted in* 1983 U.S.C.C.A.N. 1625, 1628. The Conference Report on the Adjustment Act states:

> Unlike newly hired employees who may elect whether or not to accept Government employment and face the uncertainties of a yet-to-be-established supplemental retirement program, *the affected group has no election other than to resign* (which in many instances would involve resignations from elected offices, *lifetime judicial appointments*, or presidentially appointed and Senate-confirmed positions).

Id. (emphases added).

In order to "mitigate th[is] unfairness," *id.*, the Adjustment Act allowed all of the incumbent officials added on January 1, 1984 (other than Article III judges), to choose from three options: (1) to discontinue participation in the covered retirement system (usually CSRS) and receive a refund of previous contributions (resulting in Social Security coverage only); (2) to participate fully in both the covered retirement system and Social Security; or (3) to participate in both systems subject to the Adjustment Act interim "offsets" applicable to new employees, which would leave their total deductions unchanged. Opp. App. 11a-12a.

While the provisions of the Adjustment Act might appear to encompass Article III judges, in actuality they do not. Neither the retirement provisions of the Judicial Code nor the JSAS were defined as "covered retirement systems" within the meaning of the Adjustment Act. Consequently, Article III judges were not entitled to reduce, much less eliminate, the adverse effect of the OASDI tax on their salaries.

Over the next three years, the same incumbent officials covered by the Adjustment Act received two additional opportunities to offset the economic impact of OASDI taxes on their salaries. First, the Deficit Reduction Act of 1984 gave these officials, but not Article III judges, another chance to make the same elections as the Adjustment Act, retroactive to January 1, 1984. Opp. App. 14a-16a. Second, when Congress established a new Federal Employees Retirement System (FERS) in 1986, it gave the same incumbent officials, but not Article III judges, a choice of several retirement options that enabled them to offset the economic impact of OASDI taxes on their salaries.[4] Opp. App 18a-20a.

In January 1985, the Administrative Office of the United States Courts (AOUSC) issued a report regarding the impact of the Social Security Amendments on federal judges and judicial service. J.A. 106-27. The report observed that the rationale for extending Social Security coverage to sitting judges and other incumbent federal officials was "unclear"; it had not been recommended by

---

[4] For most new employees, FERS combined Social Security with a basic benefit and an optional savings plan. While pre-1984 employees who participated in CSRS were given the option to join FERS, FERS Act § 301(a), Opp. App. 17a, only four percent chose to do so. J.A. 42. As a result, even with the turnover in federal employees that had occurred since 1984, the majority of civilian federal employees were still not subject to Social Security as of September 1991. *Id.*

the Greenspan Commission nor could it have any measurable impact on system revenues. J.A. 108. More importantly, the report found that Congress' failure to provide sitting Article III judges with an option not to participate in Social Security (1) resulted in "a significant financial disincentive to voluntary judicial service by senior judges"; and (2) was "fundamentally unfair" because the "heavy financial commitments" most sitting judges had made to provide benefits to their survivors "were severely impacted by the imposition of a substantial annual levy," the purpose of which was to provide "an old-age benefit that most judges do not need and survivor benefits for which they had made other arrangements." J.A. 121-22. Over 80 percent of active judges told the AOUSC that they would elect not to be covered if Social Security were made optional for judges. J.A. 127. Congress heeded the AOUSC report, in part, and exempted judicial service by senior judges from OASDI taxes. Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272, § 12112, 100 Stat. 313.

4. On December 29, 1989, the Respondents initiated this action by filing a complaint in what was then the United States Claims Court. The complaint alleged, *inter alia*, that the Social Security Amendments unconstitutionally diminished their compensation and did so in a manner that unconstitutionally discriminated against federal judges. On November 9, 1990, the Claims Court dismissed the judges' complaint for lack of subject matter jurisdiction (*Hatter I*). Pet. App. 12a-18a. On appeal, the Federal Circuit reversed and remanded the case for a hearing on the merits of the judges' damages action (*Hatter II*). Pet. App. 19a-29a.

5. On remand, the parties conducted discovery and filed cross-motions for summary judgment. On June 22, 1994, the Court of Federal Claims granted the government's motion for summary judgment (*Hatter III*), holding that while "direct" diminutions (*i.e.*, reductions in

statutory salaries) are always unconstitutional, regardless of purpose or effect, an "indirect" diminution (*i.e.*, the imposition of a new tax) is unconstitutional only if a judge can demonstrate that it is the product of "legislative intent to influence the judiciary." Pet. App. 38a. In addition, while the court acknowledged that the elections afforded other incumbent federal officials meant that they, unlike Article III judges, suffered "no change in take home pay," it nonetheless found this discriminatory treatment constitutional because there was no showing that Congress' action was motivated by an intent to influence the judiciary. Pet. App. 48a-51a.

6. On August 30, 1995, the Federal Circuit reversed, holding that the Social Security Amendments unconstitutionally diminish the compensation of Article III judges who took office prior to the enactment of the Amendments (*Hatter IV*). Pet. App. 66a. The court found that, in order to ensure judicial independence and attract good and competent individuals to the bench, "the Framers adopted an unrestricted protection for judicial compensation." Pet. App. 56a-58a. The court held that *Evans v. Gore*, 253 U.S. 245 (1920), controlled the case, and that where federal law did not charge plaintiffs with the duty of paying the tax in question when they first assumed office (as in *Evans*), the subsequent imposition of the tax impermissibly reduced their salaries. Pet. App. 59a. *O'Malley v. Woodrough*, 307 U.S. 277 (1939), did not affect the analysis, since the claimant judge in that case had taken office after Congress had made the taxes in question applicable to judges' salaries; thus, the "judicial claimants had suffered no diminishment in compensation after taking office." Pet. App. 60a. The court remanded the case for calculation of the amounts owed the judges in damages.

7. The government petitioned for a Writ of Certiorari, raising the question whether "some members of this Court are disqualified from hearing" the case, but

arguing, *inter alia*, that "the substantial increase in judicial salaries" that had been granted to all judges since the imposition "would appear to have offset any purported 'diminution' in compensation" caused by the Social Security Amendments. Petition for a Writ of Certiorari at 25 n.12, *United States v. Hatter*, No. 95-1733 (Prior Pet.). On October 7, 1996, finding that it lacked a quorum and that a majority of the qualified Justices "are of the opinion that the case cannot be heard and determined at the next Term of the Court," the Court issued an order stating that the court of appeals' "judgment is affirmed under 28 U.S.C. 2109 . . . with the same effect as upon affirmance by an equally divided Court" (*Hatter V*). Pet. App. 69a.

8. On remand, the Respondents submitted undisputed evidence of the amounts by which their compensation had been diminished by reason of the OASDI and HI taxes. J.A. 128-30. Notwithstanding its prior acknowledgement of the continuing nature of the Respondents' claims, *see* Prior Pet. at 25 n.12, the government argued for the first time on remand before the Claims Court that any judge whose claim was filed more than six years after the *enactment* of TEFRA (with respect to HI withholding) and of the 1983 Amendments (with respect to OASDI withholding) was barred from any recovery by the statute of limitations.

The trial court agreed, and found that only eight judges were entitled to any damages at all and that those judges' claims for diminished compensation were limited to an amount equal to the OASDI withholding for a single month (December 1983). The diminutions in compensation suffered by the eight judges thereafter were "cured" by salary increases that were granted to Article III judges (and other federal employees) beginning January 1, 1984 (*Hatter VI*). Pet. App. at 82a. Thus, the trial court held that eight of the sixteen respondent judges were entitled to no recovery, while the remaining eight were entitled to either $328.95, plus interest (for district court judges) or

$347.85, plus interest (for the court of appeals judge). Pet. App. 110a-11a.

The Federal Circuit reversed the trial court's conclusion that the general salary increases granted to all Article III judges (and other federal employees) "cured" the diminution in compensation suffered by those judges who accepted their appointments prior to the enactment of the 1983 Amendments (*Hatter VII*). Pet. App. 125a. The court found that "everything in the record and legislative history makes clear that these [salary] increases" were provided to offset the effects of inflation. Pet. App. 124a. Because the affected judges would have received the general increases regardless of whether their salaries had been diminished, "using [those increases] to offset the losses they incurred from the government's earlier wrongful act" would "deprive the pre-1983 judges of the benefit of those increases," and defeat "Congress'[ ] purposes in granting the increases." Pet. App. 125a.[5]

SUMMARY OF ARGUMENT

The guarantees of life tenure and undiminished compensation in Article III, Section 1 of the Constitution serve two important purposes: they protect the independence of the Judicial Branch and ensure that able lawyers

---

[5] The Federal Circuit panel initially agreed with the trial court that the judges' claims were not "continuing" claims, and therefore that a number of claims were time-barred. Pet. App. 126a. Thereafter, both Respondents and the government petitioned for rehearing and rehearing *en banc*. The court denied the government's petition, but granted the Respondents' petition with respect to the statute of limitations issue. In an opinion by Judge Plager, the author of the panel opinion, the *en banc* court unanimously reversed the panel's decision on the statute of limitations issue (and reinstated the panel's opinion with respect to the other issues). Pet. App. 2a. The government has not sought review of the Federal Circuit's holding on the statute of limitations issue.

are attracted to the bench. Congress' extension of Social Security taxes to sitting Article III judges violated the Compensation Clause because it undermined these purposes by reducing judicial compensation in a manner that created an economic incentive for sitting judges to leave the bench and for judicial candidates to reject such appointments. In subsequent legislation, Congress did not remedy this problem, but rather compounded it by ensuring that the only federal employees that suffered a reduction in take-home pay by virtue of the statutes in question were sitting Article III judges.

1. In 1986, this Court affirmed for lack of a quorum the Federal Circuit's decision holding that the extension of OASDI and HI taxes to Article III judges violated the Compensation Clause. The Court's decision is the law of the case, and the government has not justified the reopening of this decision on the ground that it has "worked a manifest injustice." On the contrary, to reconsider this decision some four years later would itself work such an injustice. Many of the affected judges have stopped OASDI and HI withholding and many may have made significant financial commitments in reasonable reliance on the Court's order. It would be unjust for the Court to upset the settled expectations of the Respondents and similarly situated judges.

2.a. The government's proposed reading of the Compensation Clause as prohibiting only reductions in the "stated salary in law," Pet. Br. at 28, is inconsistent with the history, purposes and plain language of the Clause. As discussed extensively in *Evans*, the Framers did not intend a narrow construction of the Clause, but one broad enough to encompass any actions by the political branches that exert " 'power over a man's subsistence.' " *Evans*, 253 U.S. at 252 (quoting The Federalist No. 79 (Alexander Hamilton)). Because of concerns that

diminutions in judicial compensation could be accomplished directly, indirectly, or "even evasive[ly]," the Framers adopted a "more positive and unequivocal" protection against diminution. *Id.* at 254-55. The *Evans* Court, therefore, correctly concluded that limiting the scope of the Compensation Clause only to reductions in statutory salary would gravely undermine its purposes. Indeed, if the interpretation of the Clause now advanced by the government were accepted, Congress could, with impunity, impose a tax on the compensation of one or more judges for the purpose of punishing them. This is precisely what the Framers sought to prevent through the Compensation Clause.

b. This Court need not revisit *Evans v. Gore*, or reaffirm its broad holding, in order to affirm the judgment below because this case does not involve the imposition of a general, non-discriminatory tax on all citizens. (1) This case instead involves the extension to Article III judges of taxes from which they had been exempt for decades. The extension of these taxes to sitting judges has precisely the same effect, and undermines the purposes of the Compensation Clause in precisely the same manner, as a diminution in their stated salaries: it alters only one side of the economic trade-off that a judge makes when he or she assumes the bench. If the political branches can act in this manner, they have the power to place sitting judges in a position where they must petition the Congress to restore their compensation or consider leaving the bench, a result that would render the Compensation Clause meaningless. (2) This case also involves a discriminatory reduction in the amount of judges' compensation. Congress expressly acknowledged that the 1983 Amendments had a discriminatory impact on the compensation of the small group of incumbent officials, including Article III judges, that were required

to join OASDI. Congress, however, proceeded to compound this problem by offering all incumbent officials *except Article III judges* three separate opportunities to avoid any decrease in take home pay. This discriminatory treatment of the Judiciary is also at the core of what the Framers sought to prevent through the Compensation Clause.

c. Contrary to the government's suggestion, affirmance of the judgment below would not require tax rates to be "frozen" at the time a judge accepts his or her appointment. So long as taxes are changed uniformly for judges and non-judges alike, the compensation of judges would not be adversely affected in a manner that could induce judges to leave office (or not accept judicial appointments). Further, it is the government's reading of the Compensation Clause that would lead to an interpretation of the Presidential Compensation Clause and the Twenty-Seventh Amendment that would permit Congress to circumvent their strictures by changing the taxes paid by the President or Members of Congress alone, which would clearly contravene the letter and purpose of those provisions.

3. The government does not dispute that the purpose of the general adjustments to judicial salaries that have occurred since 1983 was to compensate judges for the effects of inflation, not "to make whole the losses sustained by the pre-1983 judges resulting from the unconstitutional" diminishment of their compensation. Pet. App. 124a. These adjustments were not, therefore, provided by Congress to compensate for the Compensation Clause violations in this case. Moreover, inflation adjustments granted to all judges would not provide a remedy to the injured judges since they alone would be required to offset their constitutional damages against these general increases, thereby undermining the purposes of the Compensation Clause.

ARGUMENT

I. THIS COURT SHOULD AFFIRM ON LIABILITY UNDER THE LAW OF THE CASE DOCTRINE

This Court has already entered an order on liability: It *affirmed* the Federal Circuit's decision holding that the extension of HI and OASDI taxes to Respondents violated the Compensation Clause. Pet. App. 69a. That decision is the law of the case and should be adhered to. To be sure, the Court's decision was rendered for lack of a quorum. But that decision has the same effect as affirmance by an equally divided court, *see* 28 U.S.C. 2109, and there is no question that an affirmance by an equally divided court is fully binding on the parties to this case and constitutes a judgment on which they are entitled to rely. *See Durant v. Essex Co.*, 74 U.S. (7 Wall.) 107, 113 (1868) (affirmance by an evenly divided court "is as conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case"); *see also United States v. Pink*, 315 U.S. 203, 216 (1942). While this Court has the power to reopen issues decided in earlier stages of the same litigation, it has limited the exercise of this power to circumstances in which its earlier decision is " 'clearly erroneous and would work a manifest injustice.' " *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (quoting *Arizona v. California*, 460 U.S. 605, 618 n.8 (1983)). The government has not even attempted to show that adherence to the prior affirmance "would work a manifest injustice" in this case.[6]

---

[6] The government has argued that the Court should reopen the liability issue because it did not "examine the merits of that issue" when the question was previously presented. Pet. at 20. But in 28 U.S.C. 2109, Congress instructed the Court to issue an order affirming the judgment below once it determines that a quorum is not available to hear the case in the current Term or the next Term. The statute thus provides the parties with an opportunity to have their case heard in one of two consecutive

To the contrary, to reopen the issue of liability now would itself "work a manifest injustice." In the years following this Court's affirmance, upon the request of individual judges, the AOUSC stopped OASDI and HI withholding (or in a few cases just OASDI witholding) from the salaries of 89 of the so-called Hatter judges. *See* Letter from William R. Burchill, Jr. to Seth Waxman, *et al.* (Dec. 19, 2000) (lodged with the Court by the Solicitor General on Jan. 3, 2001).[7] The ruling the government seeks would plainly upset the settled expectations of the Respondents, as well as other similarly situated judges, who reasonably relied on the Court's decision. These judges have already ceased witholding of over $800,000 in Social Security taxes. *Id.* Moreover, prospectively the affected judges have undoubtedly made major life commitments – such as college tuitions, home purchases, and the like – on the basis that their future disposable income

---

Terms, but also provides them with a decision in the event that it cannot be heard in that time frame. To accept the government's argument, then, is to deprive parties of the finality and repose afforded by the statute. It also serves to encourage the losing party to engage in additional "wasteful and pertinacious" litigation, Pet. at 20, in the hope that it may return to this Court and argue that it is entitled to reopen issues that have been decided.

[7] Petitioner contends that "[t]he Department of Justice . . . did not advise AOUSC that it could [allow judges to discontinue the tax deductions into the future]." Reply Br. on Cert. Pet. at 4 n.2. The AOUSC, however, made inquiries to relevant government agencies seeking guidance on this very issue, including to the Department of Justice, which "advised that it was not their decision but rather one for the Internal Revenue Service." Enclosure to Letter from William R. Burchill, Jr., *supra*, entitled, Questions and Answers Regarding *Hatter v. United States* (January 1997) at 1. Having apparently failed to receive any guidance whatsoever, the AOUSC can hardly be criticized for implementing this Court's 1996 affirmance by permitting judges to discontinue OASDI and HI withholding.

will include amounts previously withheld for Social Security. *See, e.g.*, J.A. 95, 101-02. It would be manifestly unjust to depart from the settled law of the case, undermining what now may be irrevocable life commitments judges have made in reasonable reliance on the Court's 1996 affirmance on liability.

II. THE EXTENSION OF SOCIAL SECURITY TAXES TO SITTING ARTICLE III JUDGES VIOLATES THE COMPENSATION CLAUSE

A. The Guarantee of Undiminished Compensation Is Not Limited to Reductions in Statutory Salary

Article III, Section 1 of the Constitution guarantees that the compensation of judges "shall not be diminished during their continuation in office." U.S. Const. art. III, § 1. In *Evans v. Gore*, 253 U.S. 245, 255 (1920), this Court concluded that "the fathers of the Constitution intended to prohibit diminution by taxation" as well as reductions in the judges' statutory salaries. The government now urges the Court to overrule *Evans*, and hold that the only diminution in compensation that falls within the proscription of Article III, Section 1 is a reduction in the "salary stated in law." Pet. Br. at 28. This interpretation of the Compensation Clause is unsupportable; it is inconsistent with the history, purposes and plain language of the Clause, and if adopted would undermine the independence and competence of the Judicial Branch.

1. In *United States v. Will*, 449 U.S. 200 (1980), this Court reviewed the history of the Compensation Clause and observed that the Framers designed the Clause to achieve two related goals. One purpose of the Compensation Clause was to ensure the independence of the Judicial Branch. Despite "the longstanding Anglo-American tradition of an independent Judiciary," in 1761 King George III "converted the tenure of colonial judges to

service at his pleasure." 449 U.S. at 217-19. The dependence of colonial judiciaries on the King and Parliament was a principal factor in the outbreak of hostilities between the colonies and England.[8] Indeed, the Declaration of Independence enumerated as one of its specific grievances that the King " 'has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.' " *Id.* at 219 (quoting the Declaration of Independence). The *Will* Court concluded that, because of this history, the Framers "made certain that in the judicial articles both the tenure and the compensation of judges would be protected from one of the evils that brought on the Revolution and separation." *Id.* By proscribing the Executive and Legislative Branches' "control over the tenure and compensation of judges," the Compensation Clause guarantees that the Judicial Branch is "truly independent." *Id.* at 218.

The Compensation Clause also serves "another, related purpose": it serves to increase the stature and competence of the federal judiciary. *Id.* at 221. *See also* Charles Gardner Geyh & Emily Field van Tassel, *The Independence of the Judicial Branch in the New Republic*, 74 Chi.-Kent L. Rev. 31, 42 (1998) (the Framers wanted to "ensure that judges receive[d] salaries commensurate with their status as members of an independent branch of

---

[8] *See generally* Joseph H. Smith, *An Independent Judiciary: The Colonial Background*, 124 Penn. L. Rev. 1104 (1976). The Intolerable Acts, including the Act that made colonial judges serve at the pleasure of the King, led to more organized resistance to English rule. *See id.* at 1151-52. The First Continental Congress, in its "Declaration of Colonial Rights and Grievances," dated October 1, 1774, protested that judges had been made dependent on the King for their salaries. *See id.* at 1152. A reconciliation proposal composed by Benjamin Franklin in December 1774 insisted that judges have tenure during good behavior and be paid from colonial revenues. *Id.*

government"). As Chancellor Kent observed, the guarantee of undiminished compensation "secure[s] a succession of learned men on the bench, who, in consequence of a certain undiminished support, are enabled and induced to quit the lucrative pursuit of private business, for the duties of that important station." 1 J. Kent, Commentaries on American Law 276 (1826). The *Will* Court, citing *Evans*, found that by assuring "a prospective judge that, in abandoning private practice – more often than not more lucrative than the bench – the compensation of the new post will not diminish," the Compensation Clause "[b]eyond doubt . . . has served to attract able lawyers to the bench and thereby enhance[d] the quality of justice." 449 U.S. at 221.

2. The government asserts that the only diminution in compensation that falls within the proscription of the Compensation Clause is a "reduction in judges' salary stated in law, not a decrease in their effective take-home pay net of taxes." Pet. Br. at 28. This narrow interpretation was rejected in *Evans*, and should be rejected by this Court, as it is patently inconsistent with the history, purposes and plain language of the Clause. If this Court were to limit the scope of the Compensation Clause in the manner now urged by the government, it would provide the political branches with a ready means to accomplish precisely what the Framers sought to proscribe – *i.e.*, it would allow them to punish sitting Article III judges by simply imposing taxes on the compensation of those judges alone.[9]

---

[9] The government unequivocally urges this Court to hold that only a reduction "in judges' stated salaries, not a decrease in their effective take-home pay net of taxes" is proscribed by the Compensation Clause. Pet. Br. at 28. Yet at other times the government seems to suggest that a "discriminatory" tax on judicial compensation would be unconstitutional. *See, e.g.*, Pet. Br. at 14-15. The inconsistency in the government's position is highlighted, but not resolved, at p. 37 n.27 of its brief, where it states that although it has argued that "the Constitution's reference to 'Compensation' is *only* to judges' stated salaries," it "*assume[s]* that discriminatory taxation of judges would contravene fundamental principles underlying Article III, if not the Clause itself." (emphases added). The government's reluctance to concede that a discriminatory tax on judicial compensation would violate the Compensation Clause is understandable because, as we demonstrate below, this case involves a discriminatory tax on judicial compensation.

a. *Evans' Holding and Rationale.* The central question presented in *Evans* was: does the Compensation Clause "merely forbid direct diminution, such as expressly reducing the compensation from a greater to a less sum per year, and thereby leave the way open for indirect, yet effective diminution such as withholding or calling back a part as a tax on the whole?" 253 U.S. at 248-49. The Court first examined the purposes of the Clause, and found that its dual purposes were "to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance" of the "pervading principles of the Constitution." *Id.* at 253. Next, the Court examined the plain language of the Clause, which it found "contains no excepting words and appears to be directed against all diminution, whether for one purpose or another." *Id.* at 255. Finally, the Court examined the historical context in which the Clause was written, and found that the Framers well understood that "the power to tax carries with it 'the power to embarrass and destroy.'" *Id.* at 256 (citation omitted). Based on these findings, the *Evans* Court concluded that "the fathers of the Constitution intended to prohibit diminution by taxation as well as otherwise." *Id.* at 255.

b. *History and Text.* The *Evans* Court correctly concluded that limiting the scope of the Compensation

Clause to reductions in the statutory salary would be inconsistent with the historical underpinnings and plain language of the Clause. As the Court observed in *Will*, King George III had made colonial judges dependent on him not only for their tenure in office, but also for " 'the amount *and payment* of their salaries.' " *Will*, 449 U.S. at 219 (emphasis added) (quoting Declaration of Independence). The Framers therefore sought to ensure that the political branches could not threaten the judiciary either directly, through removal from office, or indirectly, through reductions in compensation. Alexander Hamilton explained in Federalist No. 79: "Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support. . . . In the general course of human nature, *a power over a man's subsistence amounts to a power over his will.*" *Evans*, 253 U.S. at 252 (emphasis in original) (quoting The Federalist No. 79).

This history fully supports the *Evans* Court's conclusion that the term "compensation" cannot be narrowly construed to mean, as the government now urges, the judges' "salary stated in law." The Framers' concern was with the ability of the political branches to exert "power over a man's subsistence" – *i.e.*, the amount he ultimately receives from the government to support himself and his family – not simply the nominal salary provided by statute. As *Evans* observes, Alexander Hamilton made this point clear in discussing the unsuccessful efforts of state constitutions to guarantee judicial independence and competence through the use of "*permanent* salaries." 253 U.S. at 252 (citing The Federalist No. 79) (emphasis in original). Hamilton reported that the states' "experiment has in some instances shown that such expressions are not sufficiently definite to preclude legislative evasions." *Id.* at 253. Consequently, in the Constitution, the Framers designed a protection against undiminished compensation that is "more positive and unequivocal," and thereby

affords Article III judges "a better prospect of their independence than is discoverable in the constitutions of any of the States." *Id.*[10]

History, in short, made it obvious to the *Evans* Court, as it did to the Framers, that "diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested." *Id.* at 254. To protect the judiciary against both direct and indirect assaults on its independence and competence, the Framers adopted what Alexander Hamilton termed the "more positive and unequivocal" protection of a broad prohibition on diminution in judicial compensation. This broad prohibition was implemented, as the *Evans* Court correctly observed, through language that "is general, contains no excepting words and appears to be directed against all diminution, whether for one purpose or another." 253 U.S. at 255.

While the court of appeals found that this case was governed by *Evans*, it did not follow the *Evans* decision blindly. On the contrary, the court of appeals undertook its own review of the records of the Constitutional Convention and found that the "text and history of the Compensation Clause do not support" the contention that the Clause applies only to diminutions in the statutory salary. Pet. App. 63a. The Court observed that the Convention "voiced grave concerns about potential compromises in judicial independence if judges faced the prospect of seeking legislative redress of compensation concerns." Pet. App. 62a. Based on this history, the court found that the Framers "considered judicial independence a core value of the Constitution and adopted a broad protection

---

[10] *See also* Geyh & van Tassel, 74 Chi.-Kent L. Rev. at 47 ("Unhappy experiences with judicial dependence on the crown prior to the Revolution had given way to equally unhappy experiences with judicial dependence on the legislatures afterwards . . . . ").

for it." Pet. App. 63a. Specifically, as Alexander Hamilton explained, the Framers "put it out of the power of [the legislature] to change the condition of the individual [judge] for the worse." Pet. App. 63a.[11] Because the imposition of a new tax on a sitting Article III judge "change[s] the condition of the individual [judge] for the worse," the court of appeals concluded, as did this Court in *Evans*, that the imposition of such a tax is unconstitutional. Pet. App. 64a.

c. *Purposes*. The *Evans* Court correctly concluded that limiting the scope of the Compensation Clause to reductions in the statutory salary would gravely undermine its purposes. A reduction in the statutory salary of ten percent is no different, in terms of its impact on a judge's compensation, than a tax of ten percent on that salary. Each gives the legislature the same degree of "power over a man's subsistence." As the Court observed with respect to Judge Evans: "Of what avail to him was the part which was paid with one hand and then taken back with the other? . . . Only by subordinating

---

[11] Hamilton was by no means alone in believing that a broad proscription against legislative interference with judicial compensation was necessary; at the Constitutional Convention, this concern crossed ideological and geographical divides. *See, e.g.*, Geyh & van Tassel, 74 Chi.-Kent L. Rev. at 47. As James Wilson, a Pennsylvania delegate to the Constitutional Convention, saw it, judges "should be removed from the most distant apprehension of being affected, in their judicial character and capacity, by any thing, except their own behaviour and its consequences." James Wilson, *Lectures on Law* (1791), *reprinted in* 4 The Founders' Constitution 162 (1981). Likewise, James Madison was so concerned about Congress' control over judicial compensation that he argued in favor of proscribing any diminution *or increase* in that compensation. *See Debates in the Federal Convention* (July 18, 1787); Pet. App. 62a.

substance to mere form could it be held that his compensation was not diminished." 253 U.S. at 254. The government made this point in its brief in *Will*, where it acknowledged that this Court "has recognized that 'indirect' as well as 'direct' diminishments fall within the proscription of the Compensation Clause." Brief for the United States at 68 (No. 79-983) (citing *Evans*, 252 U.S. at 248-49, 254).[12] The court of appeals reached the same conclusion on the facts of this case. Pet. App. 63a.

If the interpretation of the Clause now advanced by the government were accepted, Congress could impose a tax on the compensation of Article III judges alone, or a group of those judges, for the express purpose of punishing them. This is the very evil that the Framers sought to prevent. Yet, according to the government, such a tax would not be unconstitutional because "the diminution of judicial compensation prohibited by Article III is a reduction in the judges' salary stated in law, not a decrease in their effective take home pay net of taxes." Pet. Br. at 28. The *Evans* Court correctly rejected the government's contention, finding that "the purpose of the prohibition [could] be wholly thwarted if this avenue of attack were left open." 253 U.S. at 256.[13]

---

[12] An excerpt, including the portions cited in this brief, from the United States' Brief in *Will* is contained in the Joint Appendix filed with the Federal Circuit in *Hatter IV*.

[13] The government argues that "[t]he weight of state court cases" supports its position. Pet. Br. at 23. As this Court held in *Evans* (and as the government implicitly acknowledges in its brief, *see* Pet. Br. at 25 & n.13), however, numerous state court decisions have interpreted comparable state constitutional provisions to extend beyond direct diminutions in statutory salary. *See Evans*, 253 U.S. at 256 (citing *Commonwealth ex rel. Hepburn v. Mann*, 5 Watts & Serg. 403, 415 (Pa. 1843) (tax on state officials); *New Orleans v. Lea*, 14 La. Ann. 197 (La. 1859); *Purnell v. Page*, 145 S.E. 534 (N.C. 1903) (income tax)). *See also Long v.*

3. Neither this Court, nor any lower court, has ever embraced the government's crabbed reading of the Compensation Clause. In what appears to be the first case brought under the Clause, the Circuit Court of the District of Columbia held that a federal statute that eliminated fees charged by justices of the peace violated the Compensation Clause insofar as it applied to justices of the peace who held office when the statute was enacted. *See United States v. More*, 7 U.S. (3 Cranch) 159, 159 n.2 (1805) (setting forth lower court opinions). The *Evans* Court likewise concluded that the imposition of a tax on the compensation of sitting Article III judges violates the

---

Watts, 110 S.E. 765 (N.C. 1922) (income tax); *Gordy v. Dennis*, 5 A.2d 69 (Md. 1939) (income tax); *In re Opinions of Justices*, 144 So. 111 (Ala. 1932) (occupational tax on state and county officers). Indeed, several state courts have explicitly stated that their compensation clauses prohibit precisely that which the Social Security Amendments attempt to do, *viz.*, increase the amounts that judges must contribute to retirement programs. *See, e.g., Carper v. Stiftel*, 384 A.2d 2, 6 (Del. 1977) ("Precisely the same pension benefits cost each plaintiff over $1,000 per year more after the 1976 Amendment than they did before. It is somewhat difficult to see how it can be seriously contended that each plaintiff's 'salary or emoluments' has not been diminished."); *Hudson v. Johnstone*, 660 P.2d 1180, 1182 (Alaska 1983) ("Were the legislature to implement a contributory judicial retirement system by exacting salary deductions from justices and judges 'during their terms of office,' it would clearly run afoul of the compensation clause [of the Alaska Constitution]."") (footnote omitted). Moreover, the fact that Pennsylvania has altogether "delete[d] the prohibition against diminution of judicial salaries," Pet. Br. at 25 n.13 (citing *Hepburn, supra*), and that "Maryland amended its constitution expressly to permit . . . a nondiscriminatory tax on judicial salaries," *id.* (citing *Gordy, supra*), does not undermine interpretations of the earlier provisions which, after all, were far more analogous to the federal Compensation Clause than were the amended provisions.

Clause. In *O'Malley v. Woodrough*, 307 U.S. 277, 282 (1939), the Court held that the assessment of a "non-discriminatory tax" on "judges who took office after Congress" imposed the tax did not violate the Clause. It did not hold that the Clause reaches only reductions in the statutory salary; nor did *Will*. 449 U.S. at 221. Consistent with these holdings, the court in *Atkins v. United States*, 556 F.2d 1028, 1045, 1048 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978) found that "indirect incursions upon judicial salaries, as much as direct ones, were not tolerable under the Compensation Clause," and specifically noted that the imposition of a discriminatory tax on judges would violate the Clause.[14]

4. This Court's conclusion in *Evans v. Gore* that the Compensation Clause prohibits diminutions by the political branches in judicial compensation accomplished through means other than reductions in the statutory salary is plainly correct. It is consistent with the history, purposes and text of the Clause. To hold otherwise, as the government urges, would give the political branches ready means to accomplish the very evil the Framers sought to prevent, and gravely undermine the purposes of the Clause.

---

[14] *Jefferson County v. Acker*, 210 F.3d 1317 (11th Cir. 2000), *petition for cert. filed*, No. 00-455 (U.S. Sept. 22, 2000), is not to the contrary. First, like *O'Malley*, it involves the application of a tax "to Article III judges who were on notice when they were appointed that the tax would be applied to them," 210 F.3d at 1319, 1321-22. Second, *Acker* involves the application of a county occupation tax, not a diminution in judicial compensation imposed by the political branches of the federal government.

B. The Extension of Social Security Taxes to Sitting Article III Judges Diminishes Judicial Compensation and Thus Falls Squarely Within the Prohibition of the Compensation Clause

Although *Evans v. Gore* was correctly decided, the Court does not need to revisit that decision, or reaffirm its broad holding, in order to affirm the judgment of the court below. To be sure, the court of appeals' decision rested principally upon "the controlling Supreme Court precedent, *Evans*." Pet. App. 64a. This case is unlike *Evans*, however, in two fundamental respects. Rather than involving the imposition of a general, non-discriminatory tax on all citizens, this case involves: (1) the extension to sitting Article III judges of a tax from which they previously had been exempt for decades; and (2) the discriminatory application of a tax to the compensation of those judges.[15] Each of these distinctions provides a separate and independent basis for affirming the decision below. This Court should reject the government's invitation to reconsider and overrule *Evans* where, as here, there are two separate and independent grounds for affirmance that do not require the Court to revisit established precedent.[16] *See, e.g., United States v. IBM*, 517 U.S. 843, 862 (1996).

---

[15] As of January 1, 1983, Article III judges had been exempt from the OASDI tax for almost 50 years and from the HI tax for almost 20 years.

[16] Both of these grounds were raised in, and ruled upon by, the trial court (Pet. App. 43a-46a; 48a-51a), and raised in the court of appeals as well, *see* Brief for Appellants at 31-33, 38-50, *Hatter IV*.

1. The Extension of Social Security Taxes to Sitting Judges' Compensation Violates the Compensation Clause in the Same Manner as Would a Reduction in Their Statutory Salaries

In order to protect judicial independence and competence, the Framers prohibited the political branches from taking any action that could, directly or indirectly, induce judges to leave the bench. The critical constitutional inquiry under the Compensation Clause, therefore, cannot be simply how a particular diminution in compensation is accomplished, but whether the manner in which it is accomplished could induce judges to leave the bench. The extension of Social Security taxes to sitting Article III judges, like a diminution in their statutory salaries, unquestionably has this effect.

1. It has long been recognized that men and women who accept judicial appointments under Article III almost certainly make an economic trade-off: they leave positions that "more often than not [are] more lucrative than the bench," presumably because the non-monetary rewards of holding judicial office offset any pecuniary loss. *Will*, 449 U.S. at 221 (quoting *Evans*, 253 U.S. at 253; 1 J. Kent, Commentaries on American Law 276 (1826)). If the political branches are able to alter the terms of this trade-off *after* a judge has accepted appointment to the bench – *i.e.*, if they are able to change one side of the judges' economic equation – they will have the power to influence the judiciary in precisely the way the Framers feared. Actions that have this effect will place sitting judges in a position where they must petition the Congress to restore their compensation, or consider leaving the bench because the fundamental economic calculus on which they accepted their appointments has been changed.

Diminutions in the statutory judicial salary always have the effect of changing just one side of the judges'

economic calculus. Such diminutions, after all, decrease judicial compensation but have absolutely no impact on the compensation a judge would earn in another occupation. By altering only one side of the economic equation that the judges considered in deciding whether to accept appointment to the bench, a diminution in judicial salary could induce judges to leave the bench, and thus undermine the purposes of the Compensation Clause.

The extension of Social Security taxes to sitting Article III judges has precisely the same effect, and undermines the purposes of the Compensation Clause in precisely the same manner, as a diminution in their stated salaries. It decreases their judicial salaries but has absolutely no impact on the compensation the judges could earn in another occupation (which were already subject to such taxation), thus creating an incentive for judges to leave the bench.

Uncontroverted record testimony establishes this point. Each Respondent has testified that when he decided to accept his appointment to the federal bench, he compared his existing compensation, which already reflected Social Security deductions, to his prospective compensation as a judge, which included no diminution for Social Security taxes (and the prospect of future salary increases).[17] Judge McNamara, for example, testified that he "was concerned about paying for [his four children's] higher education." He knew he was "taking a substantial pay cut in becoming a judge and it was important to [his] weighing of the financial consequences that there would be no deduction from [his] salary for Social Security." J.A. 95. Judge Mihm testified that "[t]he financial consequences of accepting a judicial appointment were especially important to me and my family because I had spent

[17] The Respondents' declarations were filed in support of their cross-motions for summary judgment and appear in the Joint Appendix filed with the Federal Circuit in *Hatter IV*.

my career as a lawyer in public service, rather than in private practice." *Id.* at 101. Also concerned about paying for a college education for his four children, Judge Mihm said that "[b]efore accepting the appointment, my wife and I sat down at our kitchen table and discussed these financial circumstances, including the fact that I would not have amounts deducted from my pay for Social Security." *Id.* Indeed, Congress itself acknowledged that the Social Security Amendments, by "chang[ing] [the rules] in the middle of the game," gave sitting Article III judges "no election other than to resign." H.R. Conf. Rep. No. 98-542, at 13.

2. The fact that judges had been exempt from Social Security for almost fifty years (and HI taxes for almost twenty years) distinguishes this case from *Evans v. Gore*. While the effect of the income tax in *Evans* was to diminish the compensation of sitting Article III judges, it also diminished the compensation those judges could earn in another occupation. Here, in contrast, because Respondents became judges at a time when judicial salaries were exempt from Social Security taxes, the extension of those taxes altered only one side of the economic equation they weighed in deciding whether to accept their appointments.

The government contends that this analysis overlooks the benefits that sitting judges obtained "by becoming eligible for OASDI and HI coverage based on their judicial service." Pet. Br. at 35. This contention is wrong as a matter of fact, and irrelevant as a matter of law. The 1985 AOUSC report found that 95 percent of judges in active service had already attained fully insured status in the Social Security system (which would have included Medicare as well). J.A. 115. Moreover, as a matter of law, the judges' payment of Social Security taxes does not assure them of any benefits. As this Court concluded in *Bowen v. POSSE*, 477 U.S. 41, 52 (1986), the Social Security

Act "create[s] no contractual rights." The Act incorporates "Congress' express reservation of authority to alter its provisions," including the potential reduction or elimination of benefits in their entirety. *Id*. For this reason, the court of appeals rejected the government's contention that Social Security benefits must be taken into account in measuring the diminution in Respondents' salaries, finding that the "potential future benefit is entirely speculative." Pet. App. 65a. The government has not sought review of this holding.

The government's related contention, that the affected judges "have never suggested that they would waive the right to receive benefits based on their judicial service in return for exemption from OASDI and HI taxes," Pet. Br. at 35, is equally erroneous. The fact is that the judges were never offered the opportunity to make this election. The Respondents' complaint makes clear that their claim is that the statutes at issue violated the Compensation Clause because, *inter alia*, "Article III judges were not given the right granted to other federal employees to opt out of the Social Security system."[18] J.A. 26, 34-35.

3. The government argues that there is no evidence that the statutes at issue actually "caused federal judges to leave judicial service." Pet. Br. at 35. No court has ever suggested, however, that a diminution in judicial compensation is unconstitutional only if it can be shown to have caused judges to leave office. In *Will*, for example, the diminutions at issue were no greater in dollar terms than they are here, and there was no evidence that those

[18] The 1985 AOUSC report found that if the judges had been given this option, over 80 percent of active judges would have opted out of Social Security coverage. J.A. 127. And, since the AOUSC gave judges the option to cease Social Security withholding after *Hatter V*, 89 of the affected judges have done so. *See* p. 15, *supra*.

diminutions caused judges to leave office. Yet the Court found them to be plainly unconstitutional. *Will*, 449 U.S. at 225-26.

The reason the courts have not required such a showing is clear: it would completely defeat the Framers' intent in designing the Clause. The Framers were concerned that if the political branches had the power to use reductions in compensation to induce judges to leave office, judges would be subject to the influence of those branches, regardless of whether they ever exercised that power. Moreover, once the political branches have succeeded in forcing a judge from office by diminishing his or her compensation, they have achieved the very evil that the Framers sought to avoid. If this Court were to hold, as the government suggests, that a diminution in judicial compensation is unconstitutional only if there is a showing that the diminution "caused judges to leave judicial service," it would render the Compensation Clause meaningless.

4. The government also contends that the diminution in compensation that resulted from the extension of Social Security taxes to Article III judges is constitutional because it could not "have posed any threat to judicial independence." Pet. Br. at 34.[19] The government bases

[19] The government apparently has abandoned its contention that a diminution in compensation that results from the imposition of a tax on sitting Article III judges cannot be unconstitutional absent a showing that "Congress intended to undermine the independence of federal judges." Pet. at 26 n.25. In *Will*, this Court struck down Congress' rescission of certain cost-of-living increases for judges even though there was no argument that the rescissions in question were "intended to undermine the independence of federal judges." *Id*. *See also* 15 James Wm. Moore, Moore's Federal Practice ¶ 100.05[4][a-b] (Matthew Bender 3d ed. 1999) (rejecting the contention that the Compensation Clause reaches only those diminutions that "actually threaten judicial independence," explaining that "the

this contention on the broad assertion that "[i]t is likely that political constraints on the imposition of taxes on the population at large effectively prevent Congress from using generally applicable, nondiscriminatory taxes to impair the independence of the judiciary." *Id.* at 34 n.24. However "likely" this may be in a case such as *Evans v. Gore*, it is not likely at all in a case such as this, where sitting Article III judges (1) were among a very small group of existing federal employees to whom the taxes were extended, and (2) were the *only* employees that were given no opportunity to avoid the adverse impact of this diminution on their compensation.

The government, moreover, advanced the same argument in *Will*. It asserted that the statutes in that case could not have "constitute[d] an attack on judicial independence" because they "were based on important policy considerations extending far beyond the federal judiciary," and "were equally applicable to a broad range of ranking government officials, including the Vice President, Cabinet officers and Executive Schedule personnel, and members of Congress." Brief for the United States at 64-65. The Court flatly rejected this argument: the fact that Congress diminished the compensation "of various officials in the Legislative and Executive Branches, as well as judges, does not save the statute." *Will*, 449 U.S. at 226.

Indeed, the government's brief in this case acknowledges that the "political constraints" which it believes will protect judicial independence from attack through the imposition of a generally applicable, nondiscriminatory tax would not offer the same protection when the diminution in compensation "affects only a small number

---

difficulty and awkwardness of engaging in this equitable inquiry lies behind the practice of separation of powers in general. In any event, the text of Article III does not permit such a course.").

of individuals and not the general public." Pet. Br. at 34 n.24. This would be true, the government notes, if Congress diminished the statutory salaries of judges (as it did in *Will*). *Id.* But it is also true in this case, where the diminution was imposed on a small group of existing federal officials (as in *Will*) who accepted their positions before the enactment of the statutes at issue. Congress' extension of Social Security taxes to sitting Article III judges put those judges in precisely the position the Framers feared – a position where their only choices were to lobby Congress to avoid the diminution, accept the diminution, or resign from office.[20]

2. The OASDI Deductions Violate The Compensation Clause Because They Discriminate Against Article III Judges

The Federal Circuit's judgment on liability with respect to OASDI is independently sustainable on the ground that the 1983 Amendments diminished judicial compensation in a discriminatory manner. Although a showing of discrimination is not necessary to prove a violation of the Compensation Clause, *see Will*, 449 U.S. at

---

[20] This case also makes clear that even when Congress diminishes the compensation of a group of federal officials, including its own members, the judges cannot rely on those officials to protect the interests of the Judicial Branch. When Congress recognized that by "changing the rules in the middle of the game," it had placed high ranking federal officials, including sitting Article III judges, in a position where they either had to accept diminished compensation or resign, it passed a series of statutes that gave all of those officials, *with the sole exception of federal judges*, the ability to eliminate the economic impact of the OASDI withholding. *See* pp. 4-6, *supra*. This is precisely the type of legislative conduct that the Framers sought to prevent.

226 (the Clause "makes no exceptions for 'non-discriminatory' reductions"), there is no genuine dispute that the Clause prohibits the enactment of a statute that imposes a different and greater economic burden on the compensation of Article III judges. *See O'Malley*, 307 U.S. at 282; Pet. Br. at 37 n.27. Such a statute is no different, in effect, than a diminution in the judges' statutory salary; both create an incentive for judges to leave office (or decline appointments) by reducing judicial compensation alone. In this case, only Article III judges' compensation was involuntarily diminished as a result of the imposition of OASDI deductions; the take home pay of every other federal employee was protected.

1. The 1983 Amendments discriminated against Article III judges in at least two ways. First, the statute did not impose OASDI taxes on all incumbent federal employees. On the contrary, the statute added only *newly* hired federal employees and a limited number of incumbent officials, including federal judges, to the OASDI system. All other federal employees on the job before 1984, in excess of 2.5 million people, J.A. 41, were not added to OASDI unless they later elected to join. Opp. App. 17a. Ninety-six percent of these employees, however, elected *not* to join the OASDI system. J.A. 42. As to federal employees, OASDI was not, therefore, a generally applicable tax.[21]

Second, judges were treated less favorably than the small group of other incumbent officials, comprising primarily Members of Congress and their staffs, the President and Vice President, and political appointees in the executive branch, that were required to join OASDI by

---

[21] Nine months after judges were added to OASDI, more than 1.7 million federal employees remained outside the system. J.A. 42. As of the parties' 1991 stipulations, in excess of 1.5 million federal employees – more than half the civilian federal work force – were not covered by OASDI. J.A. 42.

the 1983 Amendments. Congress found that "the rules [were] being changed in the middle of the game" for this group, subjecting them to two separate retirement schemes. Conf. Rep. on Adjustment Act, H.R. Conf. Rep. No. 98-542, at 13. To remedy this unfairness, Congress enacted the Adjustment Act, the Deficit Reduction Act of 1984, and the FERS Act, each of which offered the incumbent Executive and Legislative Branch officials a separate opportunity to avoid any decrease in take-home pay. Although Congress expressly recognized that its rationale for creating these options applied equally to Article III judges, it did not extend these options to the judges. *See* pp. 4-6 *supra*; J.A. 70. As a result, as the trial court found, Article III judges "were unique among federal employees in seeing their take-home pay necessarily decrease by the amount of the Social Security tax." Pet. App. 50a.

2. The government seeks to justify Congress' decision to exclude judges from this statutory relief on the ground that judges were not subject to a "double imposition" for retirement, and that the effect of the statutes, therefore, was to "equalize" the incumbent employees' salary contributions for retirement. Pet. Br. at 39-40. This argument, however, ignores economic reality because it assumes that judges, unlike other existing employees, had not paid for their own retirement program. Pet. Br. at 39. Federal judges pay for their retirement benefits in the form of lower salaries (rather than receiving higher salaries with mandatory deductions). The 1985 AOUSC report, for example, specifically found that many judges "give up opportunities for much larger compensation," in part because the guarantee of a compensation during good behavior means that "[o]nce appointed, retirement income [is] no longer a factor in their financial planning." J.A. 121. After the 1983 Amendments, only judges bore the double imposition of lower salaries and OASDI taxes.

The government's contention that Congress' discrimination against federal judges is justifiable because it was

designed to keep federal employees "subject to only one imposition under federal law for retirement income security," Pet. Br. at 38, is equally erroneous. The Adjustment Act's interim plan for newly hired employees that took effect in 1984 did not eliminate CSRS in favor of OASDI coverage; new employees were subject to deductions for *both* systems. Opp. App. 2a, 4a; J.A. 64. Instead, Congress equalized the overall *economic* effect of adding OASDI coverage. New employees' deductions for CSRS were reduced with an offset in the amount of the OASDI deduction in order to match the total deduction level of pre-1984 employees. *Id.* Only incumbent officials (excluding judges) were allowed to completely replace participation in CSRS with participation in OASDI, and thus actually to reduce the level of their retirement deductions. Opp. App. 11a; J.A. 64-65. Therefore, in terms of the economic effect of salary deductions on federal employees, Congress retained the status quo for both pre-1984 employees and newly hired employees with two exceptions: (1) judges were subjected to increased salary deductions, and (2) a small number of incumbent officials were given the option to reduce, maintain, or increase their deductions, as they chose.[22] Only Article III judges, in short, had no ability to offset the economic impact of OASDI taxes, and no choice but to suffer an actual reduction in their take home pay. Pet. App. 50a.

---

[22] Nothing in the text or legislative history of the Adjustment Act, the Deficit Reduction Act of 1984 and the FERS Act sets forth a rationale for the discriminatory treatment accorded Article III judges compared to other incumbent officials mandatorily added to OASDI. Thus, the contentions advanced by government counsel are simply "post-hoc rationalizations" for the discriminatory treatment accorded the judiciary. Given the fundamental constitutional principles at issue, this Court should reject any rationales, such as those being offered here, for discriminatory treatment that are not derived clearly from the statutes in question.

3. Congress specifically acknowledged that the effect of the 1983 Amendments was to impose a discriminatory economic burden on judicial compensation, and that judges who could not afford to bear this burden had no choice but to leave office. Congress found that the incumbent federal officials who were mandatorily added to OASDI and "are participants in a covered retirement system will be *double covered* effective January 1, 1984. The affected group includes the President and Vice President, Members of Congress . . . and judges." Conf. Rep. on Adjustment Act, H.R. Conf. Rep. No. 98-542, at 13 (emphasis added). Moreover, by changing the rules in the middle of the game, Congress left these officials with "no election other than to resign (which in many instances would involve resignations from elected offices, [and] lifetime judicial appointments)." *Id.*

Rather than remedy this discrimination, however, Congress compounded it by providing the affected officials, except Article III judges, with the ability to offset the economic impact of OASDI taxes. The 1985 AOUSC study found that the retirement plans of sitting Article III judges, which included "heavy financial commitments to provide benefits for their survivors," had been "severely impacted by the imposition of a substantial annual levy in the form of taxes imposed under the social security system, the centerpieces of which are an old-age benefit that most judges do not need and survivor benefits for which they made other arrangements." J.A. 121.[23] Far

---

[23] The 1985 AOUSC report found that "[m]any judges do contribute 4½% of their salaries to the Judicial Survivors Annuity System, 28 U.S.C. 376," and that while these benefits "overlap social security benefits to some extent . . . Congress provided no relief from that aspect of the double deduction problem." J.A. 114. To be sure, when Congress increased the JSAS contribution rate in 1986, it gave participants a one-time option to opt out, Judicial Improvements Act of 1985, Pub. L. No. 99-336 § 2(c), 100 Stat. 633 (1986), but this "open season"

from eliminating the "double imposition" on judicial salaries, or "equalizing" the judges' economic contributions to retirement, the effect of the statutes at issue was to diminish the compensation of Article III judges in a discriminatory manner that placed the affected judges in a position in which their only options were to accept the diminution or leave office. The Constitution does not permit Congress to discriminate against judges in this manner.[24]

C. The Government Offers No Persuasive Reason Why the Diminution in the Respondents' Compensation Should Go Unremedied

Much of the government's brief is devoted to arguing that if the Court affirms the judgment below, it will be establishing a Compensation Clause precedent that is inconsistent with "[t]he text of the Constitution and [the] practicalities of tax administration." Pet. Br. at 29. The government's arguments, however, all relate to a holding that the Compensation Clause prohibits the imposition of a generally applicable, nondiscriminatory tax on all citizens. That question is not presented by this case. A holding by this Court that the Compensation Clause prohibits the extension of Social Security taxes to sitting

---

was unrelated to OASDI coverage and did not provide judges with economic offsets that harmonized OASDI with JSAS contributions.

[24] The government's implicit suggestion that such discrimination is justified so long as it is ostensibly designed to achieve a salutary purpose (*e.g.*, "equalization") is untenable. First, a statute that has the effect of diminishing judicial compensation in a discriminatory manner will undermine the objectives of the Clause – particularly its objective in attracting able lawyers to the bench – regardless of Congress' intent. Second, as James Madison emphasized, Congress can easily "mask under complicated and indirect measures, the encroachments which it makes on the co-ordinate departments." The Federalist No. 48 (James Madison).

Article III judges, or prohibits their discriminatory extension to sitting Article III judges, is perfectly consistent with the purposes and text of the Constitution, and would create no issues in the administration of the tax laws.

1. The government argues that a diminution in judicial compensation that results from the imposition of a tax can never be unconstitutional. Pet. Br. at 28. To hold otherwise, the government contends, would require the Court to embrace "implausible" readings of the Presidential Compensation Clause and the Twenty-Seventh Amendment, and to "freeze" the rates paid by judges at the time they accept their appointments. Pet. Br. at 29-32. Each of these contentions is erroneous.

a. The Presidential Compensation Clause prohibits both increases and decreases in the President's compensation during his term in office. U.S. Const. art. II, § 1, cl. 7. The government argues that this Clause should be read to allow increases in the President's compensation through the elimination of "*any* tax on the President's salary while he [is] in office." Pet. Br. at 30 (emphasis added). But surely the government does not contend that if Congress increased the President's compensation by granting relief from income taxes to the President alone, such an increase would be permissible under the Clause. The effect of such an action would be no different than increasing the President's stated salary. Nor, in light of the purposes of the Clause and this Court's decision in *Will*, could the government contend that this constitutional infirmity would be remedied if Congress extended this tax relief beyond the President to a small group of senior Executive Branch officials.

The same is true with respect to the government's argument concerning the Twenty-Seventh Amendment, which prohibits Congress from enacting laws that vary the compensation of its members until an election of Representatives has intervened. U.S. Const. amend.

XXVII. The government contends that this Amendment should not be read to prohibit Congress from imposing or repealing a tax until an election of Representatives has intervened. Pet. Br. at 31. But, again, the government surely does not contend that Congress could vary its own compensation by, for example, repealing the application of income taxes to its members alone. Nor could it contend that this constitutional infirmity would be remedied by simply extending the repeal to certain senior Executive Branch officials as well.

The extension of Social Security taxes to a small group of incumbent federal officials, including sitting Article III judges, reduced their compensation and their compensation alone. The effect of the various adjustment acts that followed was to leave sitting Article III judges as the only incumbent officials that suffered a reduction in take home pay as a result of these taxes. To affirm the judgment below that these acts were unconstitutional under the Judicial Compensation Clause would not require the Court to read the Presidential Compensation Clause or the Twenty-Seventh Amendment to prohibit the imposition or repeal of *any* tax on the President or Members of Congress. It would only suggest that these constitutional provisions be read to prohibit the imposition, extension or repeal of a tax as to the President or Members of Congress alone, or as part of a small group of federal officials.

On the other hand, if the Court accepts the government's contention that the term "compensation" as used in these various provisions of the Constitution means only the salary stated in law, it would be required to hold that the imposition, extension or repeal of a tax as to the President alone, or as to Members of Congress alone, would not violate the Presidential Compensation Clause or the Twenty-Seventh Amendment. Under this view, Congress would be free, for example, to impose a confiscatory tax on the compensation of the President alone. It

is, in short, the government's reading of the Constitution's text that is "implausible" and cannot be sustained. Pet. Br. at 31.

b. The government also contends that if compensation, as used in the Constitution, is read to mean "take-home pay net of income taxes," then the Judicial Compensation Clause must be read to prohibit "the raising of *rates* of income taxes on the salaries of sitting judges." Pet. Br. at 32. The government further contends that it may be difficult, as a practical matter, to distinguish between a "new tax and an increased income tax rate." Pet. Br. at 33. The government's argument, however, once again loses sight of the constitutional inquiry. Given the purposes of the Clause, the critical question is not how the diminution in compensation is accomplished, but whether the manner in which it is accomplished could induce judges to leave the bench.

In this case, the extension of Social Security taxes to sitting Article III judges had the same impact on the economic calculus those judges performed in deciding whether to accept their appointments as a diminution in their statutory salaries would have had: Both increase the economic incentive of sitting judges to leave the bench. In the case of an increase in tax rates, the critical constitutional question would be the same. A general increase in the level of federal income tax rates, for example, would not increase judges' incentive to leave the bench, as it would affect not only judicial compensation, but also what a judge could earn in non-judicial positions.

On the other hand, there are plainly circumstances in which an increase in the income tax rate paid by judges would be unconstitutional. The government made this point in its brief to this Court in *Will*. In arguing that there is no plausible constitutional distinction between "direct" and "indirect" diminutions in judicial compensation, the government correctly observed that "imposition of a higher income tax rate for government officials who

enjoy life tenure would raise serious problems under the Compensation Clause even though only an 'indirect' diminution would be involved." Brief for the United States at 67 n.55. This is because an increase in the rate of tax paid by judges, but not by those in non-judicial positions, would alter only one side of the economic calculus the judge performed in deciding to accept his or her appointment, and thereby increase the incentive of judges to leave the bench.

Affirming the judgment of the court below, therefore, would not require this Court to hold that Congress must "freeze" the rates of taxes paid by judges when they accept their appointments. It would only suggest that the Compensation Clause be read to prohibit an increase in the rate of tax on judicial compensation in the unusual event that this action had the effect of increasing the incentive of judges to leave the bench. On the other hand, if the Court were to accept the government's view that increases in the rate of tax on judicial compensation are never actionable under the Compensation Clause, it would be required to uphold a confiscatory increase in income tax rates that applied to judicial compensation alone. As the government recognized in its brief in *Will*, this interpretation of the Clause is untenable.

2. There is nothing in the Court's opinion in *Evans v. Gore*, nor in the government's attacks on that decision, that warrants reversal of the judgment below. *Evans* was clearly correct in holding that a diminution in judicial compensation accomplished by means of taxation may violate the Compensation Clause. Whether the Court correctly applied that fundamental principle to the tax at issue in *Evans* is irrelevant to this case, which involves a taxing statute that, in both operation and effect, undermines the purposes of the Compensation Clause in the same manner as a diminution in the judges' statutory salaries.

Nor does anything in this Court's post-*Evans* decisions warrant reversal of the judgment below. The government asserts that *Evans* is no longer good law because it "heavily relied" on a series of intergovernmental immunity decisions that the Court has subsequently repudiated. Pet. Br. at 22. This is inaccurate. The Court's decision in *Evans* is based principally on its careful study of the history and purposes of the Compensation Clause. Having reached what it termed the "obvious" conclusion based on that study that some diminutions "may be direct and others indirect, or even evasive as Mr. Hamilton suggested," the Court cited *Dobbins v. Commissioners of Erie County*, 41 U.S. (16 Pet.) 435 (1842), to "illustrate" the general principle that a diminution in compensation may be accomplished by means of taxation. 253 U.S. at 254. Later in the opinion, the Court cited other intergovernmental immunity cases to demonstrate that, while "the taxing power is comprehensive and acknowledges few exceptions," such exceptions have been recognized. *Id.* at 255.

This Court and the lower courts have consistently acknowledged (as did the government in *Will*) that there are circumstances in which the imposition of a tax can diminish judicial compensation in a manner that violates the Compensation Clause. *See, e.g., O'Malley*, 307 U.S. at 282; *Atkins*, 556 F.2d at 1045. Moreover, while the Court has narrowed the scope of the intergovernmental immunity doctrine, it continues to recognize that there are circumstances in which the imposition of a tax by one government on another is unconstitutional. *See, e.g., South Carolina v. Baker*, 485 U.S. 505, 525 (1988) (intergovernmental tax immunity doctrine protects states from discriminatory taxation).[25]

---

[25] The government also asserts that *Evans* has been undermined by Justice Holmes' dissent in that case, which was subsequently embraced in *O'Malley* and *Will*. Pet. Br. at 20-21.

There is, in short, no reason for the Court to revisit, much less overrule, *Evans* in this case. If the *O'Malley* Court had concluded, as the government now urges this Court to conclude, that under no circumstances could a tax on judicial compensation ever violate the Compensation Clause, it would have overruled *Evans* as well as *Miles v. Graham*, 268 U.S. 501 (1925). It did not. Nor did *Will*. Since *O'Malley*, *Evans* has been appropriately construed by this Court and the lower courts to be limited to the facts before it – *i.e.*, the imposition of a new tax on a sitting Article III judge. Indeed, the court of appeals here had no difficulty understanding that "[u]nder *Evans*, only judges who took office prior to the imposition of the new Social Security taxes suffered a diminution." J.A. 64a. The government's criticisms of *Evans* have no application to the facts of this case, which does not involve the imposition of a new, generally applicable, nondiscriminatory income tax on all citizens, and the government points to no other case in which the courts have even applied *Evans*, much less applied it in a manner that the government believes is inconsistent with the Constitution.

3. The government lastly argues that to affirm the judgment below, the Court would have to conclude that "Congress could not do in two steps what it could have done at one time." Pet. Br. at 34. This case illustrates why

---

Neither Justice Holmes nor the *O'Malley* or *Will* Courts, however, suggested that the imposition of a tax can never constitute an unconstitutional diminution in judicial compensation. To the contrary, as the government acknowledges, the focus of Justice Holmes' dissent is simply on whether the tax at issue "single[s] out judicial compensation." Pet. Br. at 19. *O'Malley* and *Will* likewise focus on the question of whether the tax is "nondiscriminatory." *O'Malley*, 307 U.S. at 282; *Will*, 449 U.S. at 226. In this case, the tax statutes at issue not only operated to undermine the purposes of the Compensation Clause in the manner the Framers sought to prohibit, they also singled out judicial compensation for discriminatory treatment.

this is so. The reason the government sees no harm in Congress' extension of Social Security taxes to sitting Article III judges decades after its original enactment is because it casts a blind eye toward the purposes of the Compensation Clause. The Clause was designed to prohibit diminutions in judicial compensation that, like the statutes at issue here, alter only one side of the economic equation that judges employ in deciding whether to accept their appointments. Diminutions of this nature necessarily increase the economic incentive of judges to leave the bench, and simultaneously deter potential judges from accepting appointments, for fear that the political branches will, at some point in the future, alter the terms of their economic calculus.

III. SALARY INCREASES GRANTED TO THE ENTIRE JUDICIARY DID NOT REMEDY THE DIMINUTION

The government contends that even if the extension of Social Security taxes to sitting Article III judges resulted in unconstitutional diminutions in judicial compensation, the diminutions came to an end when Congress provided general salary increases to all Article III judges and other federal employees. As a result, the government argues, the plaintiff judges in this case are at most entitled to damages for the HI and OASDI withholding from the single paycheck they received at the beginning of January 1984 (for services performed in December 1983), since the general salary increases received by judges thereafter exceeded the amount of the HI and OASDI withholding.

1. The government does not dispute that all of the salary increases that Article III judges have received since 1983 were given to broader segments of the federal workforce, and that the purpose of these increases was primarily to remedy the effects of inflation on federal salaries.

See generally 28 U.S.C. 44 & 135 (1994 & Supp. IV 1998), Historical Notes (describing judicial salary increases). The government, therefore, does not dispute the Federal Circuit's conclusion that:

> In the general salary increases Congress has seen fit to grant the judiciary in the years since 1983, there is nothing to suggest that the congressional purpose was to make whole the losses sustained by the pre-1983 judges resulting from the unconstitutional imposition of the tax at issue in this case. On the contrary, everything in the record and the legislative history makes clear that these increases were in response to continued concerns expressed in Congress, within the judiciary itself, in the bar, as well as among segments of the informed public, concerns for the wellbeing and continued vitality of the federal judiciary if the slide in purchasing power resulting from continued and unadjusted-for inflation was not halted.

Pet. App. 124a (footnote omitted).

The government nevertheless contends that these general increases remedy the constitutional violation in this case. This contention can be rejected initially as a matter of statutory interpretation. The salary increases were not provided by Congress to compensate Respondents (or comparably situated judges) for the unconstitutional diminution in their compensation. The government cannot now highjack money that was specifically appropriated by Congress to remedy one problem and, by executive fiat, deem it to be a remedy for another problem. 31 U.S.C. 1301(a) ("Appropriations shall be applied only to the objects for which the appropriations were made except as otherwise provided by law.")

2. The government suggests that Congress' purpose in increasing judicial salaries is irrelevant to the constitutional inquiry – the only issue is whether the effect of the salary increase is to raise the judge's statutory salary

above the pre-diminution level. Even if this were correct, a general salary increase granted to the entire judiciary cannot remedy the unconstitutional diminution in this case because it does not place the Respondents in the same position they would have been in but for the unconstitutional diminution. *See, e.g., Milliken v. Bradley,* 418 U.S. 717, 746 (1974).

The basic problem with the government's position, as the Federal Circuit found, is that had there been no unconstitutional diminution in this case, the Respondents would have received and enjoyed the full benefit of the post-1983 salary increases. J.A. 122a-23a. It is undisputed, however, that they are not in this position today; the unconstitutional diminution has deprived them of the full benefit of the salary increases. To see this, consider the following example: On February 1, Congress decreases the salary of Judge A from the $100,000 statutory salary to $25,000 because it disagrees with a recent decision that he issued. Then, on March 1, Congress increases the salary of all federal judges, including Judge A, by $76,000, so that Judge A earns $101,000 and his colleagues earn $176,000. It is the government's position that, as of March 1, the Compensation Clause violation would be remedied.

But it would be a strange constitutional remedy indeed that does not seek to undo the effects of the constitutional violation. In this case, the effect of the rule advanced by the government is to leave the Respondents in essentially the same position they would have been in had they never filed suit. While the Respondents are certainly better off because of the general salary adjustments, it is also certain that these increases did not make them whole for the diminution they suffered and continue to suffer.

3. Contrary to the government's contention, this Court's decisions offer no support for its position on remedy. *Will* did not address the remedy issue *sub judice,*

but rather, simply stated in a footnote the nature of the relief sought by the plaintiffs in that case. *See* 449 U.S. at 206 n.3 & 209 n.6. Indeed, to the extent that *Will* is relevant at all, it supports the Respondents' position in this case. This Court's analysis of "Year 4" in *Will* demonstrates that the mere fact that a judge's salary is higher in a year than it was in the previous year does not mean that no diminution has occurred; the Court held that the statute at issue diminished the compensation of Article III judges even though the judicial salary in "Year 4" was 5.5 percent higher than it was in "Year 3." 449 U.S. at 230.

While *Will* offers the government no support, the factual circumstances surrounding *Evans v. Gore* flatly contradict the government's position. In *Evans*, the day after the income tax statute was enacted, Congress increased the compensation of district court judges from $6,000 to $7,500, and the compensation of circuit court judges from $7,500 to $8,500[26] – increases far in excess of the amounts paid by judges to the government as a result of the imposition of the income tax. (Judge Evans' claim for the 1918 tax year, for example, was for $276.47, plus interest at a rate of six percent annually until the date paid. *Evans v. Gore*, 262 F. 550 (W.D. Ky. 1919) (relief requested in petition; Transcript of Record at 6, 10 (Dec. 31, 1919)), *rev'd*, 253 U.S. 245 (1920). Nevertheless, this Court "invalidated application of the income tax to judges who had taken office prior to the tax." J.A. 59a. Although *Evans* does not discuss this point, the Justices of this Court were undoubtedly aware of the salary increases that had granted only a year before its decision.

If, as the government contends, *any* salary increase received by judges after the imposition of a new tax

---

[26] Act of February 25, 1919, ch. 29, 40 Stat. 1156. *See also* Richard A. Posner, *The Federal Courts: Crisis and Reform* 348 (1985).

"cures" the diminution resulting from the tax, then Article III judges in *Evans* appointed prior to February 24, 1919 should have begun paying income taxes when their salaries increased on March 1, 1919. *O'Malley*, 307 U.S. at 280-82 & n.10, however, makes clear that this Court and Congress understood that *Evans* held the income tax to be invalid as applied to all sitting Article III judges for *all* tax years. *See also* 32 Op. Att'y Gen. 248 (1920) (opining that the salaries of judges appointed *after* the enactment of the income tax invalidated in *Evans* were taxable); Keith S. Rosenn, *The Constitutional Guaranty Against Diminution of Compensation*, 24 UCLA L. Rev. 308, 332 & n.94 (1976) ("Prior to 1939, federal judges were considered constitutionally exempt from income taxes.")..

4. Finally, the government argues that "[t]he effect of the court of appeals' ruling . . . is that Congress may never bring to an end a Compensation Clause violation caused by taxation of judicial salaries except by repealing the offending tax (or, perhaps, by granting the affected judges a special salary increase . . .)." Pet. Br. at 43. The implication that there would be some special difficulty remedying the violation in this case is erroneous. Prospectively, Respondents need only be granted by Congress the option whether or not to participate in Social Security – essentially the same as the option Congress gave 99% of pre-1984 federal civilian employees with respect to OASDI, and subsequently gave Senior Judges, as well as the option the AOUSC has already given the Respondents and similarly situated judges. Retrospectively, the Respondents seek precisely the same remedy sought by the *Will* judges, *i.e.*, damages for past diminutions in compensation. While such a remedy can certainly be provided by statute, the courts can provide that remedy as well. There is, in short, nothing unique or unusual required to remedy the unconstitutional diminution in this case.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

STEVEN S. ROSENTHAL
DOUGLAS A. TUCKER
NOEL J. FRANCISCO
COOPER, CARVIN & ROSENTHAL, PLLC
1500 K Street, NW
Washington, DC 20005
(202) 220-9600

W. STEPHEN SMITH*
VICTORIA A. TOMLINSON
MORRISON & FOERSTER, LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1888
(202) 887-1500
*Counsel of Record

ELLEN E. DEASON
Associate Professor of Law
University of Illinois
503 E. Pennsylvania Ave.
Champaign, IL 61820
(217) 333-1286

Supreme Court, U.S.
FILED
FEB 12 2001
OFFICE OF THE CLERK

10

No. 99-1978

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

TABLE OF CONTENTS

	Page
1. Law of the Case	2
2. Taxation as Diminution of Compensation	5
3. Discrimination	14
4. Termination of Violation	16

TABLE OF AUTHORITIES

Cases:

Alden v. *Maine*, 527 U.S. 706 (1999)	9
Agostini v. *Felton*, 521 U.S. 203 (1997)	5
Aguilar v. *Felton*, 473 U.S. 402 (1985)	5
Atkins v. *United States*, 556 F.2d 1028 (Ct. Cl. 1977), cert. denied, 434 U.S. 1009 (1978)	6
Baker v. *Commissioner*, 149 F.2d 342 (4th Cir.), cert. denied, 326 U.S. 746 (1945)	14
Booth v. *United States*, 291 U.S. 339 (1934)	19
Carper v. *Stiftel*, 384 A.2d 2 (Del. 1977)	10
Department of Commerce v. *United States House of Representatives*, 525 U.S. 316 (1999)	3
Durant v. *Essex Co.*, 74 U.S. (7 Wall.) 107 (1868)	2, 3
Evans v. *Gore*, 253 U.S. 245 (1920)	5, 11
Graves v. *New York ex rel. O'Keefe*, 306 U.S. 466 (1939)	10
Hudson v. *Johnstone*, 660 P.2d 1180 (Alaska 1983)	10
Jenness v. *Fortson*, 403 U.S. 431 (1971)	16
Mandel v. *Bradley*, 432 U.S. 173 (1977)	3
Miles v. *Graham*, 268 U.S. 501 (1925)	12, 14
Neil v. *Biggers*, 409 U.S. 188 (1972)	2
O'Malley v. *Woodrough*, 307 U.S. 277 (1939)	1, 8
Panhandle Oil Co. v. *Mississippi ex rel. Knox*, 277 U.S. 218 (1928)	10
Plaut v. *Spendthrift Farm, Inc.*, 514 U.S. 211 (1995)	9
Printz v. *United States*, 521 U.S. 898 (1997)	9
Quern v. *Jordan*, 440 U.S. 332 (1979)	2

Cases—Continued: Page

Schweiker v. *Hogan*, 457 U.S. 569 (1982) 15
South Carolina v. *Baker*, 485 U.S. 505 (1988) 9
United States v. *Armstrong*, 517 U.S. 456 (1996) 15
United States v. *More*, 7 U.S. (3 Cranch) 159 (1805) 6
United States v. *Will*, 449 U.S. 200 (1980) 8, 11, 12, 13, 15, 18, 19, 20

Constitution and statutes:

U.S. Const.:
Art. II, § 1, Cl. 7 10
Art. III 6, 9, 16
§ 1 (Compensation Clause) ..... *passim*
Amend. V (Due Process Clause) 9
Amend. XI 9
Amend. XXVII 10
28 U.S.C. 225 19
28 U.S.C. 371(a) 15
28 U.S.C. 461 ..... 19, 20
28 U.S.C. 2109 ..... 2, 3, 5

Miscellaneous:

Julius Goebel, Jr., *The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, Volume 1: Antecedents and Beginnings to 1801* (1971) 7
H.R. Doc. No. 381, 96th Cong., 2d Sess. (1980) 19
1 James Kent, *Commentaries on American Law* (John M. Gould ed., 14th ed. 1896) 7
Letter from William R. Burchill, Jr., Associate Director, Administrative Office of the United States Courts, to Seth Waxman, Solicitor General of the United States, *et al.* (Dec. 19, 2000) 4, 5
Reynolds Robertson & Francis R. Kirkham, *Jurisdiction of the Supreme Court of the United States* (Richard F. Wolfson & Philip B. Kurland eds., 2d ed. 1951) 3

Miscellaneous—Continued: Page

The Federalist No. 79 (Alexander Hamilton) 7
2 *The Records of the Federal Convention of 1787* (Max Farrand ed. 1966) 18

In the Supreme Court of the United States

No. 99-1978

UNITED STATES OF AMERICA, PETITIONER

v.

JUDGE TERRY J. HATTER, JR., ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

"[J]udges are also citizens, and * * * their particular function in government does not generate an immunity from sharing with their fellow citizens the material burden of the government whose Constitution and laws they are charged with administering." *O'Malley* v. *Woodrough*, 307 U.S. 277, 282 (1939). That is the principle that should control this case. When Congress extended to federal judges the obligation to pay Social Security taxes, it did nothing more than require judges to join the vast majority of other citizens in sharing the burden of financing a near-universal program of social insurance that benefits society at large. The great purpose of the Compensation Clause of Article III—promoting a judiciary fearless of political interference with the judicial function—was in no way undermined by Congress's inclusion

of judges in the national Social Security and Medicare programs.

1. *Law of the Case.* Respondents renew their contention (Br. 14-16), which they made in opposing certiorari (Br. in Opp. 15-17), that the Court should not give plenary consideration to the question whether Congress violated the Compensation Clause when it extended to judges the obligation to pay Social Security taxes. Respondents contend that that issue was definitively settled in 1996, when this Court was required to enter an order under 28 U.S.C. 2109 affirming the judgment of the court of appeals because the Court lacked a quorum to hear this case. On that point, we refer the Court to the discussion in our certiorari petition (at 19-21) and reply brief in support of that petition (at 4), and add the following:

First, the law-of-the-case doctrine prevents a court from reopening an issue only if that court actually decided the particular issue at an earlier stage of the litigation. See *Quern* v. *Jordan*, 440 U.S. 332, 347 n.18 (1979). In this case, the Court did not actually decide the merits of the Compensation Clause issue when our prior petition was before it. The Court as a Court did not even examine the merits of that issue, because a quorum was not present; the Court's judgment affirming the decision of the Federal Circuit was entered solely by operation of law.

Second, even an affirmance by an equally divided Court "is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment." *Durant* v. *Essex Co.*, 74 U.S. (7 Wall.) 107, 112 (1868);[1] see also *Neil* v. *Biggers*, 409 U.S. 188, 192 (1972).

[1] Respondents note (Br. 14) that, in *Durant*, the Court stated that a final judgment affirmed by an equally divided Court is "conclusive and binding in every respect upon the parties as if rendered upon the concurrence of all the judges upon every question involved in the case." 74 U.S. (7 Wall.) at 113. As we explain in the reply brief in support of the petition (at 4), however, in *Durant*, the Court was considering the res judicata effect of a final circuit court decree that an equally divided Court had previously affirmed. 74 U.S. (7 Wall.) at 109. The Court held that the decree was to be treated as final, just as would have been the case if it had been affirmed on a fully reasoned opinion or if the appeal had been dismissed. *Id.* at 112. The Court was not there considering the effect of an affirmance of an interlocutory order—which is not entitled to res judicata effect—nor was it considering the effect of an order affirming a lower-court judgment for lack of a quorum—which, unlike an affirmance by an equally divided Court, is entered by operation of law and does not reflect consideration of the merits of the case by the Court.

An order entered under Section 2109, like an affirmance by an equally divided Court, leaves the judgment of the court of appeals not disturbed, but also not endorsed, by this Court—much as if this Court denied certiorari (which would not, however, have been possible because it would have required action by a quorum of the Court).[2]

Third, respondents suggest (Br. 15-16) that several judges may have relied on this Court's prior order by accepting the offer of the Administrative Office of the United States Courts (AOUSC) to cease prospective withholding of Social Security taxes from their paychecks. The issue in this case,

[2] Section 2109 was enacted in 1948, when this Court's docket still reflected a substantial number of mandatory appeals from state courts and federal courts of appeals. See Reynolds Robertson & Francis R. Kirkham, *Jurisdiction of the Supreme Court of the United States* 10-28, 209-226, 489-492 (Richard F. Wolfson & Philip B. Kurland eds., 2d ed. 1951). Congress evidently wished this Court to have recourse to a uniform practice without the need to distinguish between cases on appeal and cases on certiorari. Moreover, an alternative practice, such as dismissing the appeal or certiorari petition, would have presented another problem, in that a non-jurisdictional dismissal of an appeal by this Court—unlike an affirmance by an equally divided Court—has often been understood to reflect this Court's agreement with the lower court's disposition of the case (though not necessarily the lower court's reasoning). See *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 343 (1999); *Mandel* v. *Bradley*, 432 U.S. 173, 175 (1977) (per curiam).

however, is not whether judges must pay Social Security taxes that should have been, but were not, withheld in the past, but whether judges are entitled to a permanent prospective immunity from taxes based on a court of appeals' erroneous decision about the constitutionality of an Act of Congress. Moreover, a prudent review of the materials sent to federal judges by AOUSC demonstrates that judges should not have concluded that this Court's order had made them permanently immune from Social Security taxes.

The January 1997 memorandum from AOUSC to federal judges, accompanying its initial offer to cease withholding, made clear that the Justice Department had taken the position in this litigation (based on statute-of-limitations and remedy arguments) that, notwithstanding this Court's prior order, even the original plaintiffs in this case were entitled at most to minimal monetary relief and were not entitled to prospective cessation of withholdings. AOUSC thus urged judges to consult their own legal advisers.[3] The November 8, 1999, letter from AOUSC to judges renewing the offer to cease withholding was sent at a time when a panel of the Federal Circuit had concluded that all claims in this case other than the challenge to old-age, survivors, and disability insurance (OASDI) taxes made by the original eight plaintiffs were barred by the statute of limitations (see Pet. App. 125a-127a), and when the government had sought rehearing en banc of the panel's conclusion that the constitutional violation caused by the initial application of the taxes had not terminated when Congress raised judicial salaries (see *id.* at 122a-125a). AOUSC specifically told judges that "the Federal Circuit may not yet be finished with this case," stated that it was taking a "conservative

[3] See Questions and Answers Regarding *Hatter v. United States* 1-2 (Jan. 1997), attached to Letter from William R. Burchill, Jr., Associate Director, AOUSC, to Seth P. Waxman, Solicitor General of the United States, *et al.* (Dec. 19, 2000) (lodged with the Clerk).

approach" by not initiating any changes in judges' withholdings, and observed that "some judges, because the litigation remains ongoing or for other reasons, may not wish to stop withholding."[4] Thus, whether or not it was prudent of AOUSC to offer to judges to cease statutorily-mandated withholdings at a time when there was no final judgment in this case, its communications made clear to judges that the courts had not definitively settled the permissibility of continued withholding of Social Security taxes.

Finally, this Court has declined to adhere to the law of the case when its earlier decision reflected an erroneous rule of constitutional law.[5] The Court has thus recognized that a manifest injustice is worked by knowingly persisting in the application of a decision that should be overruled. The court of appeals' decision on the merits, which this Court affirmed under Section 2109, relied squarely on *Evans* v. *Gore*, 253 U.S. 245 (1920). See Pet. App. 59a-61a. As we have shown, that decision is erroneous and does not survive closer scrutiny. See U.S. Br. 17-28. The merits of this case are thus properly before the Court for full consideration.

2. *Taxation as Diminution of Compensation.*

a. Respondents put forth a variety of theories (Br. 16-38) why the extension of a nondiscriminatory, generally applicable income tax to judges' salaries should be considered an unconstitutional diminution of their compensation.[6] Re-

[4] See Memorandum to All Judges Potentially Affected, etc., from Leonidas R. Meacham, Director, AOUSC 1-2 (Nov. 8, 1999), attached to Letter from William R. Burchill, Jr., to Seth P. Waxman, *supra*.

[5] See *Agostini* v. *Felton*, 521 U.S. 203, 236 (1997) ("In light of our conclusion that [*Aguilar* v. *Felton*, 473 U.S. 402 (1985)] would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a 'manifest injustice,' such that the law of the case doctrine does not apply.").

[6] Amici Los Angeles County Bar Association, *et al.*, argue (Br. 12-13) that there is significance to the fact that the Framers chose the word "compensation" rather than "salary" in Article III, suggesting that

spondents do not, we note, expend much effort in defending the broad proposition—which the court of appeals drew from this Court's decision in *Evans* (see Pet. App. 60a)—that *any* new tax imposed on the salaries of already-sitting judges is such a diminution simply because judges are left with less take-home pay than they had before they were required to pay the tax. As we have pointed out (U.S. Br. 29-33), that position presents insuperable difficulties, including that the same logic would prevent Congress from raising the rates of income taxes on judicial salaries as part of a generally applicable tax increase (a result respondents do not try to defend). Rather, respondents argue (Br. 19-23) that the Compensation Clause was intended to prevent evasions of judges' salary protection, and that if it is not construed broadly to preclude the imposition of *any* new tax on judges' salaries, then Congress could impose discriminatory taxes on judges. That submission is unpersuasive.

Congress intended by that word choice to protect judges' "effective" rather than legal compensation. That contention is incorrect. As the Court of Claims explained in *Atkins* v. *United States*, 556 F.2d 1028, 1050-1051 (1977), cert. denied, 434 U.S. 1009 (1978), the records of the Convention give no indication that the Framers attached any significance to the difference between the two words, but rather that they used them interchangeably. Indeed, the Compensation Clause requires that judges receive their Compensation "at stated Times," which is exactly the concept captured by the word "salary." See *id.* at 1050 (noting that "salary" means "a fixed payment made periodically to a person as compensation for regular work"). To the extent the word "compensation" might have a broader meaning than "salary," the difference might be reflected in cases such as *United States* v. *More*, 7 U.S. (3 Cranch) 159, 159 n.2 (1805), in which the Circuit Court of the District of Columbia (but not this Court) held that a statute that eliminated court fees for the benefit of justices of the peace in the District of Columbia could not be applied to justices appointed before the statute took effect. Even *More*, however, involved a direct elimination of a form of stated compensation for the benefit of Article III judges; it did not involve the application of a general tax to judicial compensation.

First, while the Convention framed the Compensation Clause to protect judges against the displeasure of the legislature, there is no suggestion in the historical record that, in so doing, the Convention also intended to exempt judges from obligations (even new obligations) such as taxes that are imposed on all citizens. The Framers acted against a decade of experience in which state legislatures had attempted to undermine the independence of the state judiciaries by several means, including the manipulation of judges' salaries. See Julius Goebel, Jr., *The Oliver Wendell Holmes Devise, History of the Supreme Court of the United States, Volume 1: Antecedents and Beginnings to 1801*, at 98-100 (1971). Alexander Hamilton argued in *The Federalist* No. 79 that the language of state constitutions had not been adequate to prevent state legislatures from acting on their displeasure with state judges by diminishing judges' compensation; thus, a more definite protection of judges' salaries was necessary to ensure their independence from legislative interference.[7] It was particularly important that this protection of judicial salaries be firm because the Framers expressly vested in Congress the power to establish judges' compensation, and thus (they recognized) also gave Congress at least the opportunity for mischief when Congress cast its attention to judges in setting those salaries. That concern for judicial independence does not, however, justify granting judges a constitutional immunity from a general tax, which Congress imposes with the broad perspective of the entire society, and not a focus on the federal judiciary.

---

[7] As Chancellor Kent explained, the Massachusetts state constitution, following an earlier English example, had provided that judges' salaries should be "established by law." 1 James Kent, *Commentaries on American Law* *295 (John M. Gould ed., 14th ed. 1896). Such language was presumably insufficient to prevent diminution in that a new statute could "re-establish" judges' salaries at a lower level.

Respondents point out (Br. 31 n.19, 32) that this Court invalidated Congress's rescission of salary increases for federal judges in *United States* v. *Will*, 449 U.S. 200 (1980), even though those rescissions affected the salaries of high-level Executive Branch officials as well as judges and were therefore, in a sense, nondiscriminatory.[8] That point may establish that the reach of the Compensation Clause's prohibition as defined by its literal language—which precludes any diminution of a judge's compensation as stated in law, regardless of the purpose of the diminution—was necessarily made broader than the Clause's core concern for preserving judicial independence. An express prohibition against only "discriminatory" or "improperly motivated" reduction of the judicial salaries that are prescribed by law might have presented a temptation to legislative evasion when Congress set judges' salaries. But that point does not establish that the Court must extend the reach of the Clause *beyond* its language to reach congressional taxing statutes of general applicability that have no relation to the Clause's core purpose of protecting judicial independence.[9]

---

[8] Respondents selectively quote (Br. 23) the government's brief in *Will* for the proposition that the government conceded there that indirect as well as direct diminutions fall within the reach of the Compensation Clause. Respondents omit the immediately following sentence in the government's brief in that case: "In our view, the same standard—which we suggest is set out in [*O'Malley* v. *Woodrough*, 307 U.S. 277 (1939)]—is applicable to 'direct' and 'indirect' diminutions." U.S. Br. at 67, *United States* v. *Will*, *supra* (No. 79-983). In other words, the government argued in *Will* that only discriminatory taxation of judges could violate the Constitution, and argued that by the same measure nondiscriminatory salary reductions should not violate the Compensation Clause.

[9] In addition, the establishment of all high-level federal employees' salaries provides Congress with a greater opportunity for interference with the judiciary than does the enactment and application of a generally applicable tax, which does not focus on federal officials at all. While it is perhaps remotely plausible that Congress would reduce salaries of other officials along with the salaries of judges in order to punish the judges, it is

The Court should also reject respondents' submission (Br. 23) that, if the application of a generally applicable, nondiscriminatory tax to judicial salaries is permissible, then Congress will also be free to discriminate against Article III judges through taxation. In the first place, the Compensation Clause is not necessarily federal judges' only protection against such discrimination. Fundamental structural principles underlying Article III may well provide such protection,[10] as may the equal protection component of the Due Process Clause. Second, even if this Court concluded that, to prevent such an assault on judicial independence, it would be necessary to apply the protection of the Compensation Clause beyond its literal terms in order to prevent evasion, and thus to reach discriminatory taxation of federal judges—*i.e.*, to reach pretextual exercises of Congress's taxing power that were actually intended to erode the independence of the judiciary—that would hardly mean that it is *also* necessary to extend the Clause far further to *nondiscriminatory* taxation that presents no actual or po-

---

inconceivable that Congress would impose a tax on society at large to punish judges.

[10] See, *e.g.*, *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (looking to the "text, structure, and traditions of Article III" to determine whether a statute contravened separation of powers principles); cf. *Alden* v. *Maine*, 527 U.S. 706, 713 (1999) (States' sovereign immunity is grounded not in the Eleventh Amendment but in "a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution"); *Printz* v. *United States*, 521 U.S. 898, 918-919 (1997) (States' protection against federal commandeering lies not in a particular clause but in "the structure of the Constitution" and its "essential postulate[s]"); Resp. Br. 43 (citing *South Carolina* v. *Baker*, 485 U.S. 505, 525 (1988), for the proposition that even after this Court overruled the broad intergovernmenal tax immunity decisions on which this Court relied in *Evans* (see U.S. Br. 19, 22-23), States are still protected from *discriminatory* taxation).

tential threat to judicial independence.[11] This Court can distinguish proper from improper taxes on judicial salaries. As Justice Holmes memorably stated, "The power to tax is not the power to destroy while this Court sits." *Panhandle Oil Co.* v. *Mississippi ex rel. Knox*, 277 U.S. 218, 223 (1928) (dissenting opinion); see also *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 488-490 (1939) (Frankfurter, J., concurring).[12]

b. Respondents also contend (Br. 27-33) that, even if the Compensation Clause would not have prevented Congress from applying Social Security taxes to the salaries of already-sitting judges when Congress first enacted the Social Security and Medicare programs, once Congress excluded judicial service from those programs, it was required

[11] For the same reason, the Court should also reject respondents' suggestion (Br. 39-40) that, unless the Constitution prohibits the imposition of any new taxes on federal judges' salaries (as well as those of the President and Members of Congress), then Congress will be able to grant discriminatory relief from income taxes to the President and Members of Congress alone. Indeed, as we have pointed out (U.S. Br. 30-31), respondents' construction would *require* Congress to discriminate either in favor of or against the President and Members of Congress every time that it altered income tax rates, imposed a new tax on income, or eliminated an income tax, because the President's salary may not be "encreased" or "diminished" during his term of office, U.S. Const. Art. II, § 1, Cl. 7, and that of Members of Congress may not be "var[ied]" until an intervening election of Representatives, U.S. Const. Amend. XXVII.

[12] Respondents cite (Br. 24 n.13) state cases (*Carper* v. *Stiftel*, 384 A.2d 2 (Del. 1977), and *Hudson* v. *Johnstone*, 660 P.2d 1180 (Alaska 1983)) that have invalidated, under similar state constitutional provisions, new contribution requirements imposed on state judges to finance their judicial pensions. Those cases, however, did not involve generally applicable taxes assessed against citizens to finance a universal program of social insurance for the benefit of society at large. Rather, they involved an alteration in the mechanism for financing judges' deferred *compensation*, essentially forcing judges to pay more in the present for their pension in the future. Those cases therefore have no application to Social Security taxes, which finance a broad social program.

to maintain the tax exemption for sitting judges permanently. According to respondents, because the Clause "serve[s] to attract able lawyers to the bench and thereby enhances the quality of justice" (*Will*, 449 U.S. at 221), it must be read to preclude any congressional enactment that would upset the economic calculus made by judges when they accept a judicial appointment. In particular, respondents argue (Br. 27-29, 44-45) that, when they accepted judicial service, they anticipated that their judicial salaries, although perhaps generally lower than salaries in the private sector, would (unlike private-sector salaries) remain free of Social Security taxes. Thus, they contend (Br. 27), Congress's subsequent decision to extend those taxes to judicial salaries is invalid because it had the tendency to "induce judges to leave the bench."

Respondents' position is far removed from the text and purposes of the Compensation Clause. First, even the *Evans* Court noted that the function of the Clause is not "primarily to benefit the judges, [but] rather to promote the public weal by giving them that independence which makes for an impartial and courageous discharge of the judicial function." 253 U.S. at 248. The Clause does not, therefore, require Congress to freeze in place every expectation that judges have about their future level of compensation, as long as Congress neither reduces judges' salary stated in law nor impermissibily discriminates against judges so as to impair their independence. Indeed, this Court in *Will* rejected an argument very similar to the one pressed by respondents here, when it held that the Clause did not prevent Congress from preventing planned annual cost-of-living adjustments to judges' salaries from taking effect (as long as Congress acted before the effective date of those adjustments)—even though those adjustments had long been included in the statutory definition of judicial salaries, and even though the judges anticipated when they accepted their judicial commissions that they would receive those adjustments in

the future. See 449 U.S. at 226-227.[13] Although the judges argued in *Will* that they had been "promised" those annual adjustments, this Court stressed that "the Compensation Clause does not erect an absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges," *id.* at 227.[14]

In addition, respondents' proposed test (that a new tax or increased tax rate on judges' salaries is invalid if it has a tendency to induce judges to leave judicial service) is uncertain and imprecise of application. Numerous and varied factors shape judicial compensation and net income, and so any expectation that respondents might have had about the future level of their judicial compensation and net income when they accepted their commissions was highly speculative. For example, even if respondents anticipated when

[13] When Congress legislated to prevent cost-of-living adjustments for judicial salaries from going into effect in Years 2 and 3 in *Will*, that legislation undoubtedly made judicial service relatively less attractive than the private sector, in which cost-of-living adjustments were subject to private ordering. It also made judicial service relatively less attractive than other federal-sector jobs, the salaries of which were adjusted in Years 2 and 3 to reflect increases in the cost of living. See U.S. Br. at 10-11, *United States* v. *Will*, *supra* (No. 79-983). Nonetheless, this Court held that Congress's cancellation of the planned adjustments in judicial salaries for Years 2 and 3 did not violate the Clause. 449 U.S. at 226-229.

[14] It was at that very point in its opinion that the Court in *Will* cited *O'Malley* for the proposition that "the Compensation Clause does not forbid everything that might adversely affect judges," 449 U.S. at 227 n.31. Significantly, the Court then continued by pointing out that because *O'Malley* overruled *Miles* v. *Graham*, 268 U.S. 501 (1925), and *Miles* relied on *Evans*, "*O'Malley* must also be read to undermine the reasoning of *Evans*," on which the district court in *Will* had relied in holding that judges had an interest protected by the Compensation Clause in future salary increases that they had been "promised." 449 U.S. at 227 n.31. *Will* thus greatly undermines respondents' reliance (Br. 44) on *Evans* for the proposition that the Compensation Clause protects against assessment of a new tax against judges' salaries simply because it would not be consistent with their expectations.

they accepted judicial appointments that they would not be required to pay Social Security taxes on their judicial salaries, their salaries net of tax might nonetheless have been reduced in an equivalent amount by adjustments in the generally applicable income tax rate (and respondents do not challenge Congress's power to adjust that rate in that fashion). In addition, respondents could not have had any enforceable expectation of statutory salary increases, since the Compensation Clause does not impose any obligation on Congress to increase judicial salaries. See *Will*, 449 U.S. at 228-229. Nonetheless, Congress has granted judges substantial salary increases since 1984. See U.S. Br. 8. Thus, even if respondents expected when they took office that their net salaries would remain no lower than they were at that time, that expectation was protected, because their statutory salary increases since 1984 far exceed the incidence of Social Security taxes on their 1984 salaries.

Respondents are also wide of the mark in arguing (Br. 27) that the extension of Social Security taxes to judges was invalid because the Framers wished to prevent judges from being placed in the position of petitioning Congress for restoration of their compensation. Although the Clause was undoubtedly intended to prevent Congress from bringing judges to heel by reducing their compensation, the Framers did not eliminate congressional authority over judicial salaries, but rather "delegated to Congress the discretion to fix salaries and of necessity placed faith in the integrity and sound judgment of the elected representatives." *Will*, 449 U.S. at 227. Further, as we have explained (U.S. Br. 36), while the Framers understood that Congress's power over judges' statutory salaries carried a potential for abuse, Congress's power to tax those salaries in a nondiscriminatory way does not present the same concern because the legislature is responsive to the citizenry's objection to burdensome taxation.

Respondents argue (Br. 32-33), however, that no such protection from the citizenry was available to them in this case because in 1983 and 1984 Congress did not impose taxes on society at large for the first time, but rather extended preexisting general taxes to judges for the first time. It is not apparent, however, why any danger to judicial independence is presented by requiring judges in federal service to participate in the funding of a national program of near-universal social insurance that benefits the entire society. Under respondents' reading of the Clause, any time that Congress momentarily granted judges favorable income tax treatment—even through inadvertence, or based on a misapprehension of constitutional restrictions on taxation of judicial salaries—the Constitution would prohibit Congress from returning judges to a position of equal tax treatment with the general population. Such a result is far removed from the Compensation Clause's core concern of protecting judges from political interference with their independence.[15]

3. *Discrimination.* Respondents' alternative argument (Br. 33-38), that Congress impermissibly discriminated

---

[15] The same argument that the Compensation Clause freezes any tax advantage enjoyed at any time by federal judges was rejected by a distinguished panel of the Fourth Circuit (including Chief Justice Stone) in *Baker* v. *Commissioner*, 149 F.2d 342, cert. denied, 326 U.S. 746 (1945). *Baker* involved a federal judge who was appointed in 1921, after Congress initially extended the income tax to judicial salaries in 1919, and also after this Court's decision in *Evans*. After the Court's decision in *Miles* v. *Graham*, 268 U.S. 501 (1925), Congress repealed the income tax on all judges' salaries until 1932; but after the decision in *O'Malley*, upholding the tax as applied to judges appointed after June 6, 1932, Congress re-extended the income tax to the salaries of all federal judges, including those who had taken office before that date. Judge Baker argued that, because Congress had at one point repealed the income tax on his salary, Congress was prohibited from ever reimposing it. The Fourth Circuit disagreed, rejecting the claim that "a judge is any the less subject to the tax, because in some years * * * Congress did not see fit to impose it." 149 F.2d at 344.

against federal judges when it brought them within the OASDI system, is also without merit. Respondents' claim of discrimination is based on the fact that, when Congress first made judges subject to the 5.7% tax imposed on almost all other citizens that finances the OASDI system, it left most incumbent federal employees subject to a *larger* (7%) salary deduction for the Civil Service Retirement System (CSRS), and required others (Members of Congress, congressional employees, and certain high-level Executive Branch officials) to choose between CSRS and OASDI. That was not discrimination; it was equalization.

To establish impermissible discrimination, respondents must show at a minimum that they were treated differently from others similarly situated. See *United States* v. *Armstrong*, 517 U.S. 456, 458 (1996); *Schweiker* v. *Hogan*, 457 U.S. 569, 585 (1982). But federal judges—who were not previously required to pay anything out of their judicial salaries to finance their own retirement annuities, but who were and are entitled to retire on an annuity at taxpayer expense (see 28 U.S.C. 371(a))—were not situated similarly to other incumbent federal employees, who were already required to contribute to CSRS.[16] Congress was therefore entitled to treat their situations differently.[17]

---

[16] Respondents remark (Br. 35) that federal judges effectively pay for their retirement benefits themselves by accepting lower salaries than they would have received in the private sector. We do not question that many federal judges could receive greater compensation in the private sector, but the same is true of many other federal employees as well. See *Will*, 449 U.S. at 204 (noting that system for adjustment of federal salaries, including that for judges' pay, was intended "to bring federal employees' salaries in line with prevailing rates in the private sector"). Nevertheless, federal civil service employees have been required since 1920 to finance their retirement income out of their federal salaries, while federal judges were exempt from any such obligation before 1984. See U.S. Br. 3.

[17] Moreover, Congress treated the federal officers and employees most closely situated to federal judges before 1984—Members of Congress and

When Congress extended OASDI benefits and taxes to federal employment in 1984, it had two objectives (in addition to bringing as many federal employees as practicable within the OASDI system): to preserve federal employees' expectations in their long-funded civil service annuities, and to make all federal employees' salaries subject to one—but only one—contribution for a retirement income security program.[18] See J.A. 112-113. For most incumbent federal employees covered by CSRS, Congress accomplished those objectives by allowing them to remain in CSRS and not subjecting them to OASDI taxes. For others, including federal judges, Congress did so by bringing them within the OASDI system, and by allowing those officers and employees who previously had been covered by CSRS but were now made subject to OASDI taxes to terminate their CSRS coverage (and of course Congress also preserved judges' entitlement to their own retirement annuities at no cost to the judges). See J.A. 63-65. Thus, if federal judges had been allowed to "opt out" of OASDI, they alone, among federal officials and employees, would not have been required to make any contribution to either OASDI *or* CSRS. That would have been preferential treatment, not equal treatment. Cf. *Jenness* v. *Fortson*, 403 U.S. 431, 442 (1971) (not-

---

congressional employees who were not subject to mandatory CSRS deductions—very similarly to federal judges. Those persons were required to elect between CSRS coverage and OASDI coverage. See J.A. 63, 65. Thus, a congressional employee who, like a federal judge, had not contributed to CSRS before 1984 was thereafter subject for the first time to a contribution from salary for retirement income security purposes.

[18] Respondents state (Br. 36) that new federal employees were in fact required to contribute twice, once to OASDI at a 5.7% rate, and once to CSRS at a reduced 1.3% rate. The net effect, however, was the same as the single 7% CSRS deduction from incumbent federal employees' salaries. Moreover, respondents can hardly demonstrate impermissible discrimination by showing that other employees were subject to more and greater contributions than they were.

ing that the "grossest discrimination" may lie in giving equal treatment to things that are not in fact alike).

4. *Termination of Violation.* Article III provides that the compensation of federal judges may not be "diminished." Respondents acknowledge (Br. 45) that, after Congress extended Social Security taxes to their salaries, it increased their salaries in an amount greater than those taxes. From that point, their salaries were no longer "diminished" in any reasonable sense of that word.

Our position is not, as respondents seem to believe (Br. 45-48), that the prospective statutory increase in judges' salaries retroactively "cured" or "remedied" any constitutional violation that may have occurred before those increases as a result of the extension of the challenged taxes. If respondents' salaries were unconstitutionally diminished in the amount of those taxes in the month before the salary increases took effect, then they must be made whole for that diminution.[19] But they are entitled *only* to be made whole to

---

[19] Thus, respondents err in contending (Br. 47) that, under our submission, if a judge's salary were reduced from $100,000 to $25,000 and then increased to $101,000, the Compensation Clause violation caused by the reduction would be "remedied" by the increase. The increase would *terminate* the continued improper diminution of the judge's compensation, but it would not *remedy* the past violation. The judge would be entitled to be made whole for the full amount of the $100,000 salary, up to the point when Congress increased the salary to $101,000; but once the judge received $101,000, his salary would no longer have been "diminished."

There may be a separate constitutional question whether (as in respondents' hypothetical example, see Br. 47) Congress may discriminate *among* federal judges in setting salaries, but that issue is not presented here, for respondents' salaries are not less favorable than those of other federal judges. In addition, Congress has imposed the same Social Security taxes on all active judges' salaries. Indeed, it is respondents who would require Congress to make distinctions among federal judges in setting salaries, for as we have pointed out (U.S. Br. 42-43), respondents' position on remedy, which was endorsed by the court of appeals (see Pet. App. 122a), could well require Congress to establish at least two separate

the extent of the diminution; they are not entitled to receive a salary *greater* than the amount stated in law, as long as that amount is equal to or greater than the total compensation they should have received at all earlier times. If, for example, Congress improperly reduced judges' salaries from $140,000 per annum to $130,000, but then raised their salaries after a year at $130,000 to $150,000, then the judges unquestionably should recover the $10,000 that was improperly taken from them in the year before the later salary increase took effect; but they would not be entitled to recover $10,000 per annum in perpetuity *in addition* to the $150,000 annual salary. And that would be true whether or not one of Congress's purposes in increasing the salaries had been to terminate the constitutional violation caused by the diminution to $130,000.

Respondents' efforts to draw support for their contrary position from *Evans* and *Will* are unavailing. Respondents point out (Br. 48-49) that, immediately after Congress imposed income taxes on judges in 1919, it also raised judges' statutory salaries; yet, they note, thc Court did not suggest in *Evans* that the salary increase terminated the constitutional violation caused by the taxation. But the Court in *Evans* concluded that *any* taxation of judges' salaries was unconstitutional; no salary increase could have terminated a violation caused by a tax under that theory. That point only underscores that *Evans* was wrongly decided. Respondents also note (Br. 48) that this Court ruled in *Will* that Congress

---

salary levels for sitting federal judges, depending on their date of appointment. The Constitutional Convention was wary of the possibility of Congress's paying judges differentially based on their date of appointment; that prospect was the reason that Charles Cotesworth Pinckney successfully opposed a prohibition on increases in a judge's salary (because such a prohibition would have likely meant that later-appointed judges would be paid more than earlier-appointed ones). See 2 *The Records of the Federal Convention of 1787*, at 430 (Max Farrand ed. 1966).

unconstitutionally diminished judges' compensation in "Year 4" when it rescinded a statutory pay increase that had already taken effect, even though that rescission left judges with higher salaries than they had received in "Year 3." See 449 U.S. at 208-209, 229-230. But that rescission *did* diminish judges' salaries stated in law, because the statutory increase had already vested before it was rescinded. Cf. *Booth* v. *United States*, 291 U.S. 339, 352 (1934) (holding that the Clause prohibits "a diminution after an increase," even "if the compensation notwithstanding the reduction remains in excess of that payable when the incumbent took office"). The Court did not suggest in *Will* that, in subsequent years, Congress was required to pay judges *more* than the full amount stated in law that had vested before the rescission, as respondents suggest.[20]

---

[20] Amicus Federal Judges Association (FJA) seeks support (Br. 24-25) from the facts of "Year 5" in *Will*, when Congress again afforded judges a statutory salary increase and then again unconstitutionally rescinded it. FJA points out that the district court eventually awarded damages to the judges in *Will* in the full amount of the vested initial salary adjustments in both Years 4 and 5, and did not conclude that the salary adjustment in Year 5 offset the amount of the constitutional violation in Year 4. FJA overlooks the fact that, under the statutes governing federal pay, the 9.12% adjustment to judicial pay that took effect in Year 5 was legally based on the amount of judges' pay as if the full adjustment in Year 4 had taken effect and had never been rescinded, *not* the amount that judges received in Year 4 after the unconstitutional rescission. See *Will*, 449 U.S. at 204 (noting that district judges' pay is defined by 28 U.S.C. 225, which provides that those judges shall receive a salary "as adjusted by" 28 U.S.C. 461). Thus, the 9.12% salary increase for Year 5 applied to federal judges' salaries "as adjusted by" Section 461 in previous years, including the full extent of the adjustment for Year 4. Although Congress did attempt to rescind the Year 4 adjustment, that rescission was not part of the statutory "adjustment" to judicial salaries in Section 461, but was effectuated pursuant to a separate statute (see *Will*, 449 U.S. at 208-209) and thus was not factored into the Section 461 base for salary adjustments in future years. Indeed, when the President transmitted to Congress his federal pay proposals for Year 5, he noted both the salaries that federal

Respondents therefore err in asserting (Br. 49) that they seek only what the *Will* judges received, namely, damages for past diminution in their compensation. Respondents seek far more than the measure of their damages; they seek a perpetual bonus in addition to their statutory salary. The Constitution requires no such remedy.

* * * * *

For the reasons stated above and in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

FEBRUARY 2001

---

judges should have received under Section 461 and the maximum amount payable to judges after the rescission. See H.R. Doc. No. 381, 96th Cong., 2d Sess. 81 (1980). Moreover, by the time the President sent those proposals for Year 5 to Congress, the district court in *Will* had already stated that, as a matter of statutory construction, it was doubtful that the rescissions in Year 4 applied to judicial salaries. See 449 U.S. at 210. Congress therefore understood that the 9.12% adjustment to judicial salaries for Year 5 would be based on the full amount of those salaries for Year 4, notwithstanding the rescission.

JAN 5 2001

No. 99-1978

Supreme Court, U.S.
FILED
JAN 5 2001
CLERK

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JUDGE TERRY J. HATTER, JR., *et al*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE AMICUS CURIAE FEDERAL JUDGES ASSOCIATION IN SUPPORT OF RESPONDENTS

KEVIN M. FORDE*
RICHARD J. PRENDERGAST
JANICE R. FORDE
KEVIN R. MALLOY

Attorneys for Amicus Curiae Federal Judges Association

*Counsel of Record

KEVIN M. FORDE LTD.
RICHARD J. PRENDERGAST LTD.
111 West Washington Street
Suite 1100
Chicago, IL 60602
(312) 641-1441

BEST AVAILABLE COPY

TABLE OF CONTENTS

The Interest of the Amicus Curiae 1

Summary of Argument..... 2

Argument 5

I. THE IMPOSITION OF SOCIAL SECURITY TAXES ON THE SALARIES OF ARTICLE III JUDGES DIMINISHED JUDGES' COMPENSATION IN VIOLATION OF THE COMPENSATION CLAUSE..... 5

A. The History Of The Compensation Clause And The Decisions Of The Court Support A Broad Reading Of The Clause To Accomplish Its Purposes..... 6

1. The Historical Background of the Compensation Clause..... 6

2. Decisions of the Court..... 9

B. The Court Of Appeals Was Correct To Follow Evans..... 18

C. The Decision Of The Court Of Appeals Should Be Affirmed Because The Social Security Taxes Imposed On Judges' Salaries Were Not Uniformly Applied To All Americans And Were Discriminatory As to Judges..... 19

1. The Social Security Taxes Here Were Not Uniformly Applied to all Citizens. 19

2. The Social Security Taxes Discriminated Against Judges..... 21

II. HAVING SUFFERED DIMINUTION IN THEIR COMPENSATION, THE PLAINTIFF-JUDGES MUST BE MADE WHOLE. 22

CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Agostini v. Felton, 521 U.S. 203 (1997) 18

Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971) 23

Booth v. United States, 291 U.S. 339 (1934) 14, 15

Eide v. Sarasota County, 908 F.2d 716 (11th Cir. 1990) .. 23

Evans v. Gore, 253 U.S. 245 (1920) ..... *passim*

Hatter v. United States, 64 F.3d 647 (Fed. Cir. 1995) .. 4, 18

Hatter v. United States, 519 U.S. 801 (1996) 4

Hatter v. United States, 185 F.3d 1356 (Fed. Cir. 1999) 9, 22

Miles v. Graham, 268 U.S. 501 (1925) 13, 14, 18

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982) 7

O'Donoghue v. United States, 289 U.S. 516 (1933) 14, 15, 18

O'Malley v. Woodrough, 307 U.S. 277 (1939) ..... *passim*

Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477 (1989) 18

United States v. Will, 449 U.S. 200 (1980) ..... *passim*

Will v. United States, 90 F.R.D. 336 (N.D. Ill. 1981) 24

CONSTITUTION, STATUTES

U.S. CONST., art. III, § 1 ..... *passim*

Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2206, 98 Stat. 494 (1984) 21

Federal Employees' Retirement Contribution Temporary Adjustment Act of 1983, Pub. L. No. 98-168, tit. II, § 208, 97 Stat. 1106-12 (1983) 21

Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (1986) 21

Social Security Amendments of 1983, Pub. L. No. 98-21, § 101(a)(1), (b)(1) & (d), 97 Stat. 65, 68-69 (1983) 2

Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 278(a), 96 Stat. 324, 559 (1982).... 2

OTHER

DECLARATION OF INDEPENDENCE (U.S. 1776)..... 7

The Federalist No. 47 (James Madison) 7

The Federalist No. 51 (James Madison)
(Clinton Rossiter ed., 1961) 8

The Federalist No. 78 (Alexander Hamilton)
(Clinton Rossiter ed., 1961) 7

The Federalist No. 79 (Alexander Hamilton)
(Clinton Rossiter ed., 1961) 8

1 J. Kent, Commentaries on American Law 276 (1826)..... 9

31 Op. Att'y. Gen. 475 (1919)..... 15, 16, 22

Supreme Court Rule 37..... 1

No. 99-1978

In the Supreme Court of the United States

United States of America, Petitioner

v.

Judge Terry J. Hatter, Jr., et al., Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE FEDERAL JUDGES ASSOCIATION AS AMICUS CURIAE

This brief is submitted on behalf of the Federal Judges Association as *Amicus Curiae* in this cause. The filing of this Brief was authorized by consent under Supreme Court Rule 37.3(a).[1]

THE INTEREST OF THE AMICUS CURIAE

The Federal Judges Association ("FJA") is an independent, voluntary association of judges of the United States who hold their office under Article III of the Constitution of the United States. The purpose of the Association is to seek the highest quality of justice for the

---

[1] This brief was authored by FJA counsel only. No person or entity, other than FJA, made a monetary contribution to the preparation or submission of this brief. (Sup. Ct. R. 37.6).

people of the United States. In pursuing this purpose, FJA is authorized to do all things reasonable and necessary, including:

- preserve and protect the ability of the Federal Judiciary to attract and retain the best qualified men and women for judicial service; and

- preserve and protect the independence of the Federal Judiciary from intrusion, intimidation, coercion or domination from any source.

The filing of this brief was authorized by unanimous vote of the Executive Committee of the Association.

SUMMARY OF ARGUMENT

Prior to the adoption of the "Social Security Amendments" of 1982 and 1983,[2] Article III judges were not required to make contributions to the Social Security system for Medicare Hospital Insurance ("HI") or Old Age & Survivors Disability Insurance ("OASDI"). With the adoption of those amendments, effective January 1, 1983, and January 1, 1984, respectively, judges' salaries were directly taxed and thereby reduced each month for contributions into these programs. The legislative purpose behind the mandatory enrollment of judges was to help support the "system," which was financially threatened. The plaintiff-judges neither needed nor wanted the "benefits" of participation in the program. The judges, therefore, claimed that their compensation was unconstitutionally diminished by these Acts. The Court of Appeals agreed.

It is obvious that a judge's compensation may be reduced in violation of the Compensation Clause through taxation. The dispute here concerns the circumstances in which the taxation of a judge's salary causes a constitutional violation. In Evans v. Gore, 253 U.S. 245 (1920), the Court held that a judge's salary may not be taxed at all. In a subsequent case, O'Malley v. Woodrough, 307 U.S. 277 (1939), the Court limited Evans to proscribe only taxes not in effect when the judge took office. Evans, as modified by O'Malley, holds that no new tax may be imposed on the salary of a sitting judge. In this case, the government concedes that if Evans is controlling, the plaintiffs here should prevail. The government also concedes that Evans has never been overruled by this Court. It argues, however, that Evans has been undermined by two subsequent cases, O'Malley and United States v. Will, 449 U.S. 200 (1980), and should now be overruled.

Alternatively, the government contends that any violation of the anti-diminution provisions of Article III was cured (and the judge's compensation claim satisfied) when Congress subsequently approved increases in judges' pay in amounts greater than the amount wrongfully withheld. (Govt. Bf., pp. 14, 17, 40-43).

For the reasons set out in this brief, FJA, as *Amicus*, respectfully urges this Court to affirm the decision of the Court of Appeals.

---

[2] Withholding of the Hospital Insurance portion of the Social Security tax (*i.e.*, Medicare) from the salaries of Article III judges was accomplished pursuant to the Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 278(a), 96 Stat. 324, 559 (1982). Withholding of the Old Age and Survivors Disability Insurance portion of the tax was accomplished pursuant to the Social Security Amendments of 1983, Pub. L. No. 98-21, § 101(a)(1), (b)(1) & (d), 97 Stat. 65, 68-69 (1983).

1. Recognizing that Evans has never been overruled, the Court of Appeals was duty bound to follow it. The court correctly did so in its 1995 decision, Hatter v. United States, 64 F.3d 647 (Fed. Cir. 1995) ("Hatter IV"). The Court of Appeals did not rely solely on Evans. It also relied on the historical purposes of the Compensation Clause. This Court affirmed, Hatter v. United States, 519 U.S. 801 (1996) ("Hatter V").

2. Even if the Court disagrees with the holding in Evans, plaintiffs should prevail because the taxes here were not taxes shared by all other citizens in like circumstances. See O'Malley, 307 U.S. at 282; Evans, 253 U.S. at 265 (Holmes, J., dissenting). The rationale of O'Malley was, first, that the imposition of a tax on the general population eliminates the risk that the Legislative and Executive Branches will use the tax as a means to punish judges; and, second, that a judge is no worse off as a result of such a tax than the judge would be if he or she held some other public office or position in the private sector. This rationale is not applicable here. Not only was the tax not applied uniformly to all citizens, it was not even applied uniformly among government employees. The government concedes and its authorities acknowledge that a tax or other statute applied to judges in a discriminatory manner can violate the Compensation Clause. (Govt. Bf., p. 37 n. 27).

3. *Amicus* respectfully urges the Court, should it determine that Evans should be overruled, to reaffirm and restate the principles enunciated in Evans regarding the interpretation and application of the Compensation Clause. Those principles have never been criticized and continue to define the scope and meaning of the Clause.

4. As to the government's alternative argument, FJA suggests that where a violation of the Compensation

Clause occurs, the violation is not remedied by an unrelated general increase in judges' pay. Rather, as with any other constitutional violation based on money wrongfully withheld or taken, the constitution requires that the party injured by the violation be made whole. Here, the proper measure of damages is the difference between what the judges actually received and what they would have received if the violations had not occurred. Contrary to the assertions of the government, United States v. Will does not support its argument that a subsequent increase cures any violation. To the contrary, when damages were computed in Will, judges were repaid all that was withheld as a result of the unconstitutional acts complained of there.

ARGUMENT

I. THE IMPOSITION OF SOCIAL SECURITY TAXES ON THE SALARIES OF ARTICLE III JUDGES DIMINISHED JUDGES' COMPENSATION IN VIOLATION OF THE COMPENSATION CLAUSE.

In its 200 year history, the Court has been called upon to interpret the Compensation Clause in only a handful of cases, the last being 20 years ago. United States v. Will, 449 U.S. 200 (1980). In this appeal the government asks this Court to overrule the Court's first, and in some respects, its most important, opinion interpreting and applying the Clause. The government presumes in its argument that if Evans v. Gore, 253 U.S. 245 (1920) is overruled it will win its case. The government's presumption is not valid. Although the Court of Appeals correctly found Evans as controlling precedent, it did not rely solely on that decision. It measured its ruling against the historical purposes of the Compensation Clause and it applied well-settled principles consistently announced by the Court. The application of

these principles supports affirmance. Indeed, as shown below, the "tax" at issue here does not pass muster, even under the test proposed by the government.

FJA respectfully submits that the implications of this case go well beyond the damage claims of these plaintiff judges. The principles expressed by the Court in Evans are sound and have been cited by the Court and other courts on many occasions. Such important precedent should not be overruled.

FJA's principal concern in this case is that the Court continues to interpret and apply the Compensation Clause consistent with its purposes as expressed by the Founders and the earlier decisions of the Court, including Evans.

A. The History Of The Compensation Clause And The Decisions Of The Court Support A Broad Reading Of The Clause To Accomplish Its Purposes.

1. The Historical Background of the Compensation Clause.

The Compensation Clause, Article III, Section 1, of the Constitution of the United States directs that judges of the United States receive "a Compensation, which shall not be diminished during their Continuance in Office." U.S. CONST., art. III, § 1.

The purpose of Article III, Section 1 was to perfect the basic plan of Articles I, II and III of the Constitution to make each branch of government separate from and independent of the others. The Framers recognized that nothing less than tyranny would result if one branch could control or dominate another, particularly the Judiciary. See

Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 57-58 (1982) (quoting The Federalist No. 47 (James Madison)).

The Founders were also aware from experience that the Judiciary would not be independent if the Executive or Legislative Branch could control their tenure or compensation. In the Declaration of Independence, the colonists criticized the King of England for having "made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries." United States v. Will, 449 U.S. 200, 219 (1980) (quoting DECLARATION OF INDEPENDENCE (U.S. 1776)).

The Framers were concerned about the inherently defenseless status of the Judicial Branch and its consequent need for special protection if it was to remain independent. As Alexander Hamilton stated in The Federalist No. 78:

> [T]he judiciary is beyond comparison the weakest of the three departments . . . it can never attack with success either of the other two; and . . . all possible care is requisite to enable it to defend itself against their attacks.

The Federalist No. 78, at 465-66 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

The Founders provided this essential special protection through two related provisions: appointment for life (the Tenure Clause) and the promise of a compensation protected against diminution (the Compensation Clause). They recognized, too, that life tenure was meaningless without the guarantee of an undiminished compensation. As Hamilton explained in The Federalist No. 79:

> Next to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support .... In the general course of human nature, a *power over a man's subsistence amounts to a power over his will.*

The Federalist No. 79, at 472 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis in original). See also id. at 473-74.

Madison gave a similar account of the Convention's thinking (and his own), making it clear that all "emoluments" of the office, not just salary, were to be protected.

> It is equally evident that the members of each department should be *as little dependent as possible* on those of the others *for the emoluments annexed to* their offices. Were the executive magistrate, or the judges, not independent of the legislature in this particular, their independence in every other would be merely nominal.

The Federalist No. 51, at 321 (James Madison) (Clinton Rossiter ed., 1961) (emphasis added). The Founders therefore resolved "to put it out of the power [of the Legislative Branch] to change the condition of the individual [judge] for the worse." The Federalist No. 79, at 473 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Article III, Section 1 was designed to accomplish these objectives.

2. Decisions of the Court.

At every opportunity the Court has interpreted the Compensation Clause consistent with the Founders' objectives.

As the Court said in United States v. Will, 449 U.S. 200, 218 (1980), the Clause is the cornerstone of our doctrine of judicial independence, designed to protect the rights of all citizens "to have claims decided by judges who are free from potential domination by other branches of government." The Court in Will also recognized that the Clause serves a related purpose: to assure a prospective judge who is contemplating the abandonment of a more lucrative private practice that the judicial compensation will not diminish. This assurance serves "to attract able lawyers to the bench and thereby enhances the quality of justice." Id. at 220-21 (citing Evans v. Gore, 253 U.S. 245, 253 (1920) and 1 J. Kent, Commentaries on American Law 276 (1826)).

The Court's first opinion in a Compensation Clause case came in Evans v. Gore. The Court used this historic opportunity to publish a comprehensive opinion on the principles and purposes of the Clause, no doubt aware that its pronouncements would govern the scope and application of the Clause for generations to come. The Court of Appeals in this case correctly acknowledged Evans as a "seminal" opinion (Hatter v. United States, 185 F.3d 1356, 1359 (Fed. Cir. 1999) ("Hatter VII")), because the principles enunciated therein regarding the interpretation and application of the Clause continue to define its scope and meaning.

In Evans, the Court held that Article III, Section 1 prevented Congress from imposing an income tax on the salary of a judge, despite the fact that the tax applied uniformly to all citizens. In reaching its decision, the Evans

Court reviewed the historical authorities previously discussed and, drawing heavily from the writings of Hamilton and Madison, made clear that the Clause must be interpreted, not narrowly, but broadly, in a way that achieves its objectives.

The Court emphasized that without a truly independent Judiciary, the concept of checks and balances, which is fundamental to our system of government, would be unattainable. It also acknowledged the Founders' concern that the Judicial Branch not be dominated by the others, particularly the Legislative Branch:

> The Constitution was framed on the fundamental theory that a larger measure of liberty and justice would be assured by vesting the three great powers, – the legislative, the executive, and the judicial, – in separate departments, each relatively independent of the others; and it was recognized that without this independence – if it was not made both real and enduring – the separation would fail of its purpose. All agreed that restraints and checks must be imposed to secure the requisite measure of independence; for otherwise the legislative department, inherently the strongest, might encroach on or even come to dominate the others, and the judicial, naturally the weakest, might be dwarfed or swayed by the other two, especially by the legislative.

Evans, 253 U.S. at 249.

The Court went on to relate the Founders' recognition that true independence of the judiciary required both life tenure and a guarantee of undiminished compensation.

> Can there be any doubt that the two things thus coupled in place – the clause in respect to tenure during good behavior and that in respect of an undiminishable compensation – were equally coupled in purpose? And is it not plain that their purpose was to invest the judges with an independence in keeping with the delicacy and importance of their task and with the imperative need for its impartial and fearless performance?

Id. at 252.

The Court then explained that the Founders' objectives in adopting the Compensation Clause were not to benefit the judges, but,

> like the clause in respect of tenure, to attract good and competent men to the bench and to promote that independence of action and judgment which is essential to the maintenance of the guarantee's limitations and pervading principles of the Constitution and to the administration of justice without respect to persons and with equal concern for the poor and the rich.

Id. at 253.

With these objectives in mind, the Court opined that the Clause is to be construed broadly to accomplish its objectives: "[I]t is to be construed, not as a private grant, but as a limitation imposed in the public interest; in other words, not restrictively, but in accord with its spirit and the principles on which it proceeds." Id. at 253-54.

Drawing again on the writings of Hamilton, the Court also cautioned that Article III may be violated by direct or indirect actions of the other branches:

> Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect, or even evasive as Mr. Hamilton suggested. But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition. Nothing short of this will give full effect to its spirit and principle.

Id. at 254.

The principles of Evans, derived by that Court from the most authoritative sources, particularly the writings of Hamilton and Madison, may be summed up concisely.

1. A truly independent judiciary is the cornerstone of our constitutional democracy.

2. Life tenure and the guarantee of undiminished compensation are essential to judicial independence. They are interdependent. Without the assurance regarding compensation, life tenure would be meaningless.

3. In matters relating to compensation, the Constitution has placed judges in a very special and protected class among federal officers and employees. This special protection was conferred, not for the benefit of judges, but because the survival of an independent judiciary depends upon it.

4. Consistent with these constitutional principles, the Compensation Clause is to be read broadly, "not restrictively," recognizing that it is designed to strictly limit, "in the public interest," any action by the other branches which "directly or indirectly takes from a judge compensation provided by law," i.e., any act of Congress that might have a negative impact on compensation is strictly scrutinized.

Applying these principles the Court concluded that a judge's salary could not be taxed.

Justice Holmes dissented.[3] But his dissent did not criticize the fundamental principles expressed by the majority. He disagreed only with the application of these principles to the tax at issue. He expressed a view that judges should be subject to the tax, which he described as the "ordinary duties of a citizen." Evans, 253 U.S. at 265 (Holmes, J., dissenting). According to Justice Holmes, a judge's salary could be taxed in the same way that his house or personal investments may be taxed. He distinguished that situation from the Constitution's concern with "preventing attempts to deal with a *judge's salary as such*." Id. (emphasis added).

Subsequent decisions of the Court demonstrate that Justice Holmes' disagreement with the majority related to the result only. The principles specified above were consistently followed in subsequent decisions.

In Miles v. Graham, 268 U.S. 501 (1925), the Court applied the holding of Evans to the case of a judge who took office *after* the income tax was enacted. The Court held that the judge's income could not be taxed. The Court repeated

---

[3] Justice Brandeis joined in the dissent.

In Miles v. Graham, 268 U.S. 501 (1925), the Court applied the holding of Evans to the case of a judge who took office *after* the income tax was enacted. The Court held that the judge's income could not be taxed. The Court repeated many of the statements and principles concerning Article III quoted above. It is interesting to note that Justice Holmes, the author of the dissent in Evans, was a member of the Court in Miles and did not dissent. Justice Brandeis noted his dissent but wrote no opinion.

The Court next addressed the scope of Article III when the economic crisis of the 1930's gave rise to two other important cases, O'Donoghue v. United States, 289 U.S. 516 (1933), and Booth v. United States, 291 U.S. 339 (1934). During the Great Depression, Congress found it necessary to reduce the salaries of all government employees, including those judges who were not protected by Article III. Judge O'Donoghue served on the District of Columbia Court and the issue in his case was whether that court was an Article III court or an Article I court. The Court held that the District of Columbia Court was an Article III court and that therefore Judge O'Donoghue was entitled to life tenure and compensation protected from diminution by the Compensation Clause.

O'Donoghue is relevant here because it reaffirmed the principles of judicial independence laid down in Evans. Indeed, every statement from Evans quoted above was quoted with approval there. Every principle enumerated above was endorsed there, and described as "time honored and never discredited." O'Donoghue, 289 U.S. at 533. The Court not only adopted the principles of Evans, it expressed the view that the importance of their enforcement imposed upon every federal judge, "a duty to withstand any attempt, directly or indirectly in contravention of the Constitution, to diminish this compensation." Id. This duty is imposed not

for the purpose of protecting the financial well being or "private advantage" of the individual judge, "but as a continuing guaranty of an independent judicial administration for the benefit of the whole people." Id.

O'Donoghue also emphasized that, in interpreting a statute that implicates Article III, a court must "first consider the great underlying purposes which the framers of the Constitution had in mind . . . " in adopting the Compensation Clause. Id. at 529-30. In other words, the challenged statute must be read strictly to avoid any encroachment on judicial independence.

In Booth v. United States, 291 U.S. 339 (1934), the Court again strictly construed a statute that had the effect of reducing judges' pay and held that a retired federal judge retained the protections of Article III and his compensation could not be diminished, despite the fact that salaries of most other federal employees were reduced. Notably, there was no discrimination against judges vis-à-vis other federal employees in O'Donoghue or Booth. See also United States v. Will, 449 U.S. 200, 226 (1980), discussed infra, pp. 18-19.

The Court next visited Article III in O'Malley v. Woodrough, 307 U.S. 277 (1939). In O'Malley, the Court was called upon to consider the income tax question again. Judge Woodrough, like Judge Graham in the Miles case, had been appointed to his position after the effective date of the income tax law. The Court overruled the holding in Miles (id. at 282-83), but refused the urging of the Solicitor General to also overrule Evans.

The O'Malley opinion cited with approval an opinion of Attorney General Palmer, 31 Op. Att'y. Gen. 475 (1919)(cited at 307 U.S. 280 n.3). In opining that a general, non-discriminatory tax imposed on net income was

constitutional, the Attorney General acknowledged that the Compensation Clause "would prevent the levying upon [judicial] salaries of a special tax not applicable to others enjoying like incomes." 31 Op. Att'y. Gen. at 484. Mr. Palmer, like Justice Holmes, also pointed out that the tax was on net income from all sources and was not imposed "on their salaries as such" or in a "discriminative way." Id. at 486-87.

The Court's opinion in O'Malley runs less than five full pages in the United States Reports (307 U.S. at 278-83). It does not criticize the general principles of Evans. It merely disagrees with their application to a general tax on the net income of a judge appointed prior to the imposition of a tax. Like Justice Holmes' dissenting opinion in Evans, the majority in O'Malley saw the *holding* of Evans as being far stricter than what is warranted to accomplish the purposes of Article III. The O'Malley Court expressed the view that the application of a tax on net income, *uniformly applied to all citizens*, would not bring about the evils that the Compensation Clause was designed to prevent.

The next and most recent Compensation Clause case decided by the Court was United States v. Will, 449 U.S. 200 (1980). The claims in Will did not involve taxes. Will involved the interpretation and application of a statute that provided the mechanism for calculating and paying cost-of-living adjustments ("COLAs") to judges and other high-ranking government officers. The Court concluded that the statute at issue did not establish a right to a COLA, but only provided a formula to compute the COLA, should Congress determine that one should be paid. Will is relevant here only because the government claims a comment by the Court there further undermines Evans. (Govt. Bf., pp. 21-22). But the Will Court's reference to Evans focused only on attempts by counsel for the judges to read that decision too broadly by

attributing to Evans a rule that Article III imposed an "absolute ban on all legislation that conceivably could have an adverse effect on compensation of judges." Will, 449 U.S. at 227. Significantly, the Will Court did not overrule Evans. To the contrary, it cited Evans with approval for a number of the principles recited above. See Will, 449 U.S. at 217, 221, 226 n.30.

The Will Court also discussed O'Malley and explained the difference between a tax or burden that affects all citizens, and a non-discriminatory tax imposed on a smaller universe such as a group of federal employees. The government had relied upon O'Malley to support an argument that because the adjustments were withheld from all other Executive Level positions, there was no discrimination and that a non-discriminatory reduction in judges' pay did not violate the Compensation Clause. The Court rejected this argument, pointing out that in O'Malley the Court was dealing with a tax imposed on "*all taxpayers*." Will, 449 U.S. at 226 (emphasis added). The Court explained that the inclusion of a group of federal employees in the reduction did not bring the case within O'Malley's rationale:

> The Government contends that Congress could reduce compensation as long as it did not "discriminate" against judges, as such, during the process. That the "freeze" applied to various officials in the Legislative and the Executive Branches, as well as judges, does not save the statute, however . . . The inclusion in the freeze of other officials who are not protected by the Compensation Clause does not insulate a direct diminution in judges' salaries from the clear mandate of that

> Clause; the Constitution makes no exceptions for "nondiscriminatory" reductions.

Id. This statement, of course, fits squarely with the holdings in O'Donoghue and Booth and lays to rest any argument here that judges' pay may be subject to a special tax simply because the tax is imposed on some other federal employees.

B. The Court Of Appeals Was Correct To Follow Evans.

Evans has never been overruled. The Court of Appeals was duty-bound to follow it. The Court correctly did so in its 1995 decision, Hatter IV, 64 F.3d 647 (Fed. Cir. 1995). Even had the Court of Appeals agreed with the government that O'Malley or Will had so weakened Evans that it would ultimately be overruled, it was not for that court to anticipate such action by this Court. The Court has admonished against such speculation and has directed the lower courts to follow any Supreme Court decision that directly controls, leaving to the Court "the prerogative of overruling its own decisions." Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989); accord, e.g., Agostini v. Felton, 521 U.S. 203, 237 (1997).

Moreover, the Court of Appeals did not rely solely on the *holding* of Evans. It looked to the deliberations of the Founders at the Convention. Hatter IV, 64 F.3d at 651. It looked to the writings of Hamilton and Madison. Id. It looked to the opinions of the courts, particularly the Court. Id. at 650-52. Its reasoning and decision that the taxes at issue violated Article III are soundly based on all of those sources.

FJA respectfully submits that even if this Court disagrees with the holding of Evans, that case should not be

If this Court disagrees and determines that Evans should be overruled, *Amicus* urges the Court to preserve the principles enunciated in Evans, which have never been criticized, modified or overruled. Indeed, as noted above, subsequent decisions of the Court have adopted and reaffirmed the principles of Evans.

C. The Decision Of The Court Of Appeals Should Be Affirmed Because The Social Security Taxes Imposed On Judges' Salaries Were Not Uniformly Applied To All Americans And Were Discriminatory As To Judges.

1. The Social Security Taxes Here Were Not Uniformly Applied to all Citizens.

Even under the government's reading, there is a constitutional violation under the Compensation Clause where the tax imposed on judges is not universally applied to all citizens. In O'Malley, the Court based its reasoning upon the fact that the income tax at issue was generally applied to all citizens. The Court accepted the government's position that a tax laid generally on all taxpayers in like circumstances was not an unconstitutional diminution of judges' salaries, and stated that "[t]o subject them to a general tax is merely to recognize that judges are also citizens. . . ." 307 U.S. at 282. This position was set forth earlier by Justice Holmes in his dissent in Evans, where he commented that "[t]o require a man to pay the taxes that all other men have to pay cannot possibly be made an instrument to attack his independence as a judge." 253 U.S. at 265.

Clause itself." (Govt. Bf., p. 37 n.27). Attorney General Palmer, in his 1919 opinion concluding that the Revenue Act of 1918 did not violate the Compensation Clause, pointed out that the Act did not levy a tax upon judges' incomes "in any discriminative way." 31 Op. Att'y. Gen. at 487. Here, however, Article III judges were the *only* federal employees not given the ability to avoid the negative impact of the OASDI tax. The tax was discriminatory and therefore unconstitutional.

II. HAVING SUFFERED DIMINUTION IN THEIR COMPENSATION, THE PLAINTIFF-JUDGES MUST BE MADE WHOLE.

The government's contention that subsequent pay adjustments compensate for or "cure" any unconstitutional diminution in compensation makes no sense. The Court of Appeals correctly recognized that the plaintiffs would be forced, under the government's theory,

> to pay, from their own pockets and out of their own salaries, including generally-granted increases, the damages owed to them by the government. . . . It would be inequitable to charge these judges with the duty to pay their own damages from their own salaries, out of salary increases that Congress thereafter granted to all judges, increases unrelated to that liability.

Hatter VII, 185 F.3d at 1362. The Court thus recognized that the Social Security taxes that plaintiffs were required to pay were the measure of the monetary damages suffered. The fact that, for wholly unrelated reasons, judges and other federal employees subsequently received salary increases is irrelevant.

Once a constitutional violation has been established, the victim is entitled to recover damages suffered as a result of the violation. The concept is a simple one. The government must restore what has been improperly taken. See Eide v. Sarasota County, 908 F.2d 716, 720 (11th Cir. 1990). As the Court held in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971), a party "is entitled to recover money damages for any injuries he has suffered as a result [of a constitutional violation]." In cases involving compensation, damages are measured by comparing what the plaintiff received with what he or she would have received if there had been no violation.

Where, as here, the taking is accomplished through the imposition of a tax, the government must refund whatever has been improperly collected and stop imposing the tax. Where, as in United States v. Will, 449 U.S. 200 (1980), a portion of a judge's lawful salary is withheld, that portion wrongfully withheld must be repaid through "backpay"; and, to prevent further injury, salaries must be restored to their proper levels. In Will, the plaintiffs recovered the difference between the compensation that had been paid them and the compensation that would have been paid them but for the constitutional violations. In Year 1 (described by the government at Govt. Bf., pp. 41-42), the judges claimed that for each of the first five months of that year (October 1976 through February 1977), they received 1/12 of $42,000, whereas their lawful salary was 1/12 of $44,000, i.e., the salary they would have received if Congress had not unconstitutionally stopped payment of the COLA after it had become law.[5] In March 1977, judges' lawful pay established under the Salary Act was set at

---

[5] References are to salaries of district judges.

$54,500 per annum. Will, 499 U.S. at 206. For the rest of that fiscal year, judges received the full salary to which they were entitled by law. Accordingly, there was no claim of any constitutional violation. The action complained of (the withholding of the 4.8% COLA for 1977) no longer had any effect on judges' salaries so that the payment of backpay for October 1976 through February 1977 fully satisfied plaintiffs' claims.[6]

The government glosses over the fact that the plaintiffs in Will also prevailed on a second claim; the withholding of the adjustments for fiscal 1980, referred to in the Opinion as Year 4. Will, 449 U.S. at 229-30. On remand, the plaintiffs asserted a claim for a fifth year, Year 5 (fiscal 1980). Because the circumstances in Year 5 were legally the same as Years 1 and 4, the government conceded liability and damages. The judges ultimately recovered the full amount claimed. Damages were calculated for both years based on the amounts withheld each month up to December 31, 1980, the date that new salary levels, ordered by the district court, went into effect. The new "lawful" salaries were determined by compounding the amount of the 1980 adjustment (Year 4) of 12.9% and the 1981 adjustment (Year 5) of 9.12% for a total increase of $10,983. See Will v. United States, 90 F.R.D. 336, 341 n.7 (N.D. Ill. 1981). If the government's argument that a subsequent increase cures an earlier violation were correct, the Year 5 increase would have significantly "cured" the Year 4 violation. The two adjustments would not have been compounded to establish the correct salary level and the full measure of damages. But the government's current "curing" concept was not even suggested then for the obvious reason that it would not have made the judges whole. It would not have paid them the

---

[6] Their ultimate measure of damages was 5/12 of $2,000, or $833.30. See Will v. United States, 90 F.R.D. 336, 341 n.8 (N.D. Ill. 1981).

difference between what they received and what they would have received, but for the constitutional violation.

The government's "curing" theory would also undermine one of the most fundamental purposes of the Compensation Clause. Under the government's theory, Congress could do precisely what Article III, Section 1 was designed to prevent – punish the Judiciary for unpopular decisions, and then permit Congress to "cure" its unconstitutional actions by including judges in a generally applicable percentage pay increase which would have been enacted even if the unconstitutional reduction in pay had never occurred. That percentage pay increase might well bring them up to their former salary level, but it would not raise their salaries to where they otherwise would have been absent the unconstitutional reduction. The dangers inherent in the government's argument expose it for what it is – an abandonment of the fundamental protections guaranteed by Article III, Section 1. The Court of Appeals was correct to reject this argument.

CONCLUSION

The Federal Judges Association, as *Amicus Curiae*, respectfully submits that the judgment of the Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

KEVIN M. FORDE*
RICHARD J. PENDERGAST
JANICE R. FORDE
KEVIN R. MALLOY

KEVIN M. FORDE LTD.
RICHARD J. PENDERGAST LTD.
111 West Washington Street
Suite 1100
Chicago, IL 60602
(312) 641-1441

Attorneys for Amicus Curiae
Federal Judges Association

**Counsel of Record*

JAN 5 2001

Supreme Court, U.S.
FILED
JAN 5 2001

No. 99-1978

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

JUDGE TERRY J. HATTER, JR., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE LOS ANGELES COUNTY BAR ASSOCIATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BAR ASSOCIATION OF SAN FRANCISCO, CHICAGO BAR ASSOCIATION, CONNECTICUT BAR ASSOCIATION, FEDERAL BAR COUNCIL, ILLINOIS STATE BAR ASSOCIATION, AND NEW YORK COUNTY LAWYER'S ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

RICHARD WALCH
LOS ANGELES COUNTY BAR ASSOCIATION
261 S. Figueroa St., Suite 300
Los Angeles, CA 90012
(213) 627-2727

MARK E. HADDAD*
CATHERINE V. BARRAD
PAUL J. WATFORD
SIDLEY & AUSTIN
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for the Amici Curiae

* Counsel of Record

[Additional Counsel Listed on Inside Cover]

January 5, 2001

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

BEST AVAILABLE COPY

EVAN A. DAVIS
ASSOCIATION OF THE BAR
OF THE CITY OF NEW YORK
42 W. 44th Street
New York, NY 10036
(212) 382-6700

AMITAI SCHWARTZ
BAR ASSOCIATION OF
SAN FRANCISCO
465 California Street,
Suite 1100
San Francisco, CA 94104
(415) 982-1600

STEVEN F. PFLAUM
RICHARD WILLIAM AUSTIN
CHICAGO BAR ASSOCIATION
321 South Plymouth Court
Chicago, IL 60604
(312) 554-2000

DONAT C. MARCHAND
BARBARA J. COLLINS
DENNIS F. KERRIGAN, JR.
CONNECTICUT BAR ASSOCIATION
30 Bank Street, P.O. Box 350
New Britain, CT 06050-0350
(800) 223-4400

P. KEVIN CASTEL
FEDERAL BAR COUNCIL
370 Lexington Avenue
New York, NY 10017
(212) 883-1777

HERBERT H. FRANKS
DENNIS A. RENDELMAN
ILLINOIS STATE BAR
ASSOCIATION
Illinois Bar Center
424 S. Second Street
Springfield, IL 62701-1779
(217) 525-1760

CRAIG A. LANDY
JOHN J. KENNEY
NEW YORK COUNTY
LAWYERS' ASSOCIATION
14 Vesey Street
New York, NY 10007-2992
(212) 267-6646

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether Congress violated the Compensation Clause, U.S. Const. art. III, § 1, when it imposed a new tax that adversely affected only sitting federal judges.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT	5
SUMMARY OF ARGUMENT	10
ARGUMENT	11
CONGRESS VIOLATED THE COMPENSATION CLAUSE WHEN IT IMPOSED A NEW SOCIAL SECURITY TAX THAT ADVERSELY AFFECTED ONLY SITTING FEDERAL JUDGES	11
I. CONGRESS MAY NOT DIMINISH THE COMPENSATION OF SITTING FEDERAL JUDGES BY IMPOSING DISCRIMINATORY TAXES ON THEIR SALARIES	12
II. THE 1983 SOCIAL SECURITY AMENDMENTS DISCRIMINATED AGAINST SITTING FEDERAL JUDGES BY IMPOSING AN ADVERSE FINANCIAL IMPACT ON THEM ALONE	14
CONCLUSION	18

TABLE OF AUTHORITIES

CASES — Page

Evans v. *Gore*, 253 U.S. 245 (1920) ..... *passim*
O'Malley v. *Woodrough*, 307 U.S. 277 (1939) 10, 13
United States v. *Will*, 449 U.S. 200 (1980) 12

CONSTITUTION, STATUTES AND RULES

U.S. Const., art. III, § 1 12
Social Security Amendments of 1983, Pub. L. No. 98-21, 97 Stat. 65 5
Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, 96 Stat. 324 6
5 U.S.C. § 8331, *et seq* 5
28 U.S.C. § 1 9
§ 371 ..... 5, 14
§ 376 7

OTHER AUTHORITIES

The Federalist No. 79 (Clinton Rossiter ed., 1961) 12, 13

IN THE

Supreme Court of the United States

No. 99-1978

UNITED STATES OF AMERICA,
Petitioner,

v.

JUDGE TERRY J. HATTER, JR., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE LOS ANGELES COUNTY BAR ASSOCIATION, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, BAR ASSOCIATION OF SAN FRANCISCO, CHICAGO BAR ASSOCIATION, CONNECTICUT BAR ASSOCIATION, FEDERAL BAR COUNCIL, ILLINOIS STATE BAR ASSOCIATION, AND NEW YORK COUNTY LAWYER'S ASSOCIATION, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amici are voluntary state and local bar associations, representing over 128,000 attorneys and judges, who practice

[1] No counsel for any party authored this brief either in whole or in part, and no persons other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. The parties' written consents to the filing of this brief have been filed with the Clerk of the Court.

before nearly every federal bar or preside in the federal courts. These bar associations are dedicated to improving the administration of justice and to upholding the highest principles of conduct in the legal profession. Each of the associations believes that an independent judiciary is one of the foundations of our legal system, and each has as one of its purposes the promotion of the independence of the judiciary.

Amici have a two-fold interest in this case. First, the legislation at issue deleteriously affects judicial compensation of sitting judges. Should Congress be permitted to take actions of this sort, then the independence of the judiciary may be compromised, qualified members of the bar may be discouraged from seeking judicial office (as recognized by the reports of the Administrative Office of the United States Courts), and those currently on the bench may be encouraged to leave it. Moreover, *amici* believe that financial disincentives to judicial service, on top of already large disparities in compensation between the federal judiciary and other members of the legal profession, will make judicial service attractive only to a select few, who may not be representative of the country's population as a whole, thereby diminishing the effectiveness and credibility of the federal judicial system.

Second, *amici* believe that the Compensation Clause in the United States Constitution means what it says, and that the federal judiciary has a fundamental right to be free from actions or threatened actions of Congress that diminish the judges' compensation, whether denominated as "taxes" or as "salary cuts." Because this case concerns the extent of Congress's power to legislate the compensation of judges, *amici* wish to present their views.

The Los Angeles County Bar Association was formed in 1878. It is the largest local voluntary bar association in the country, with over 23,000 members, including members of the judiciary. Among other activities, LACBA advocates for,

operates, and sponsors projects and activities designed to maintain a qualified and independent judiciary. LACBA also has standing committees on a variety of issues facing the judiciary and the judicial system.

The Association of the Bar of the City of New York is a voluntary bar association with over 21,000 members primarily from the greater New York City area. It was formed in 1870 to establish standards of conduct for all aspects of the legal profession, including the judiciary. It continues to be dedicated to ethics and the public interest, including the maintenance of an independent judiciary. The same sense of civic duty evident in its formation is carried on in its works at political, legal and social reform in the local, state, national and international arenas.

The Bar Association of San Francisco is a voluntary nonprofit membership association of over 9,000 members in the San Francisco Bay Area. Founded in 1872, the Bar Association of San Francisco enjoys the support of over four hundred sponsor firms, corporations and law schools. The association serves as a national leader in efforts to provide full and equal access to the system of justice, influence public policy and promote the effective administration of justice, engage in public service programs reaching out to youth and other vulnerable populations, and achieve equal opportunity in the legal profession and justice system for minorities, gay men and lesbians, and people with disabilities.

The Chicago Bar Association is a voluntary bar association with a membership of approximately 21,000 attorneys. Founded in 1874, the Association is dedicated to improving the administration of justice, promoting a strong and independent judiciary, and establishing and maintaining the honor and dignity of the legal profession.

The Connecticut Bar Association is a voluntary, not-for-profit association of lawyers and judges dedicated to promoting public service and advancing the principles of law and justice through its 11,000 members.

The Federal Bar Council is a voluntary association of about 2000 members of the legal profession, including members of the federal judiciary in the Second Circuit. Its purpose is to foster the highest standard of professionalism among the Federal Bar and to encourage the public good through the rule of law.

The Illinois State Bar Association is a voluntary membership, not-for-profit corporation with membership of over 32,000 attorneys and members of the judiciary. The Charter of the Association states in part that among its purposes is "to improve the prompt administration of justice through selection of qualified judges and adherence to effective standards of judicial administration and administrative procedure." The Association has sought to fulfill that goal through dedication to preservation of the independence of the judiciary, which is guaranteed in part by Article III, section 1 of the United States Constitution. Further, the Association was one of many bar association *amici* in *Spencer Williams, et al.* v. *United States*, U.S. Court of Appeals, Federal Circuit (No. 99-1572).

The New York County Lawyers' Association is a voluntary bar association founded in 1908. Its 9,000 members practice before the federal bar in New York and elsewhere. Among the Association's purposes are the promotion of the highest standards of conduct in the legal profession, improvement in the administration of justice, and support for the independence of the judiciary.

STATEMENT[2]

1. Respondents are federal judges who were appointed to the bench prior to 1983. Pet. App. 30a. At the time they took office, respondents enjoyed a status unique among the ranks of federal employees, as well as Americans generally. They were not required to pay for their publicly financed retirement benefits. *Id.* at 14a. Thus, prior to 1983, respondents were exempt from paying Social Security taxes applicable to nearly all private-sector employees, J.A. 41, and they were exempt from making the mandatory contributions to the Civil Service Retirement System (CSRS) required of nearly all federal employees, see 5 U.S.C. § 8331 *et seq.* Instead, upon meeting certain age and service requirements, respondents were guaranteed a lifetime annuity equal to their judicial salary at the time of retirement, entirely at taxpayer expense. See 28 U.S.C. § 371; Pet. App. 49a.

Effective January 1, 1984, Congress changed the status quo in a manner that singularly disadvantaged sitting federal judges. Pursuant to the Social Security Amendments of 1983, Pub. L. No. 98-21, § 101, 97 Stat. 65, 67-70, Congress enacted new rules governing the withholding of Social Security taxes from the salaries of federal employees. The impact of the amendments varied depending on the category of employees involved.

Incumbent federal employees (those employed by the federal government as of December 31, 1983) were largely unaffected by the change in the law, with certain minor exceptions noted below. Incumbent employees remained exempt, as they had been before, from paying the old-age,

---

[2] This statement is based on the declarations and exhibits filed by the parties in the Court of Federal Claims, which are reproduced in the Joint Appendix ("J.A."), and on the opinions of the trial court and court of appeals, which are reproduced in the Petition Appendix ("Pet. App.").

survivors, and disability insurance (OASDI) portion of Social Security taxes, which at the time amounted to 5.7% of an employee's salary. J.A. 47.[3] Instead, they continued to make mandatory contributions equal to 7% of their salaries to the CSRS. *Id.* at 112.

All federal employees hired after January 1, 1984, were affected more directly. For the first time, Congress required these employees to pay the 5.7% OASDI tax. Newly hired employees were still subject to withholding under the CSRS as well, however. To insure that newly hired employees did not pay any more in taxes than incumbent employees, Congress reduced the amount of the CSRS contribution for newly hired employees to 1.3%. Pet. App. 49a; J.A. 64. Thus, newly hired employees paid a total of 7% of their salaries for retirement benefits, the same amount paid by those who were hired before January 1, 1984.

Congress did require a small number of federal employees to begin paying the OASDI tax effective January 1, 1984, even though they were hired before that date. This category of incumbent employees consisted primarily of congressional officials, high-level Executive Branch officials, and federal judges. J.A. 63. Congress provided the affected Legislative and Executive Branch officials with options that insured they would pay no more for retirement benefits than they had before the change in the law. Thus, employees who were already covered by CSRS could elect to forgo CSRS coverage and receive a refund of their past contributions. They would thereby eliminate the 7% CSRS withholding altogether, and pay Social Security taxes alone. Alternatively, these employ-

[3] Incumbent federal employees were nonetheless required to pay the Medicare hospital insurance (HI) portion of Social Security taxes. J.A. 47. Congress had mandated that all federal employees, including federal judges, begin paying the HI tax for the first time effective January 1, 1983. *See* Tax Equity and Fiscal Responsibility Act of 1982, Pub. L. No. 97-248, § 278, 96 Stat. 324, 559.

ees could elect to remain under the CSRS and take advantage of the same reduction in CSRS withholding afforded newly hired employees, thereby reducing their mandatory CSRS contributions to 1.3%. *Id.* at 64.

Federal judges, however, were the only incumbent employees who were not provided any options allowing them to offset the economic impact of Social Security withholding. J.A. 70. Moreover, federal judges were now forced to pay Social Security taxes for old-age benefits that they did not need (given their lifetime annuities and the fact that most were already fully entitled to Social Security benefits because of pre-judicial contributions), see *id.* at 115, and for survivor benefits for which most had already made other arrangements (such as through the Judicial Survivors' Annuity Fund, see 28 U.S.C. § 376). J.A. 121.

2. Respondents challenged the constitutionality of the new Social Security taxes imposed on them by bringing suit in what was then the United States Claims Court. They argued that the Social Security taxes violated the Compensation Clause of Article III for two reasons: (1) the Clause prohibits any diminishment, by means of a new tax or otherwise, of the salaries of judges who, like respondents, took office prior to enactment of the tax; and (2) even if imposition of a generally applicable tax would not violate the Compensation Clause, the new Social Security taxes were discriminatorily imposed on sitting federal judges and were therefore invalid. Pet. App. 39a-40a.

The Claims Court rejected respondents' first argument by declining to follow this Court's decision in *Evans* v. *Gore*, 253 U.S. 245 (1920). There, the Court held invalid the imposition of a new federal income tax on the salary of a federal judge who had been appointed prior to the enactment of the tax at issue. The Court made clear that the Compen-

sation Clause prohibits both direct and indirect reductions of a federal judge's compensation:

> Obviously, diminution may be effected in more ways than one. Some may be direct and others indirect . . . . But all which by their necessary operation and effect withhold or take from the judge a part of that which has been promised by law for his services must be regarded as within the prohibition.

Id. at 254. Though *Evans* was controlling authority on the issue before it, the Claims Court viewed *Evans* as having been undermined by subsequent decisions, and therefore disregarded it. See Pet. App. 40a-43a.

The Claims Court also rejected respondents' second argument, even though the court found that imposition of the OASDI tax discriminated against sitting federal judges. The court noted that, generally speaking, "Congress reduced or offset the contribution federal employees were required to make to their retirement plan by the amount of any newly required Social Security tax." Pet. App. 49a. As a result, for most federal employees, inclusion in Social Security resulted in "no change in take-home pay." *Id.* Significantly, however, the court found that judges, "with no retirement plan contributions to offset, were *unique among federal employees* in seeing their take-home pay necessarily decrease by the amount of the Social Security tax." *Id.* at 50a (emphasis added). Notwithstanding this finding, the court then inexplicably concluded that "judges are being treated no worse than other federal employees and citizens." *Id.* Based on this conclusion, the Claims Court held that the Compensation Clause had not been violated. *Id.*

3. The Court of Appeals for the Federal Circuit reversed. Pet. App. 54a-66a. The court had little difficulty concluding that, under *Evans*, the new Social Security taxes imposed on respondents were invalid. *Id.* at 59a. The court of appeals

held that judges who took office prior to the enactment of a new tax suffer an impermissible diminution of their compensation, regardless of whether the tax is one of general applicability. *Id.* at 64a. Thus, the Federal Circuit had no occasion to reach respondents' argument that the 1983 Social Security Amendments were also invalid because they discriminated against federal judges.

4. The government petitioned this Court for a writ of certiorari. The Court was unable to act on the government's petition, however, because four Justices recused themselves, leaving the Court without the required quorum of six Justices. See 28 U.S.C. § 1. A majority of the non-recused Justices did not believe the case could be heard at the next Term of the Court, which led the Court to issue an order pursuant to 28 U.S.C. § 2109 affirming the judgment of the Federal Circuit. Pet. App. 69a.

5. On remand, the Court of Federal Claims (the successor to the Claims Court) proceeded to determine the amount of damages owed each of the respondents as a result of the Compensation Clause violation. The court made two rulings on remand that drastically limited the amount of respondents' recovery. First, the court held that any violation of the Compensation Clause resulting from the imposition of Social Security taxes in 1984 was "cured" shortly thereafter when Congress raised salaries for all federal judges. Pet. App. 82a. Second, the court held that recovery for many of the tax years in question was barred by the statute of limitations. *Id.* at 90a-105a. A three-judge panel of the Federal Circuit reversed the first of these rulings, *id.* at 115a-125a, and the court sitting en banc reversed the second ruling relating to the statute of limitations, *id.* at 3a-11a. This court then granted the government's second petition for certiorari. J.A. 143.

SUMMARY OF ARGUMENT

The Court need not decide here whether *Evans* v. *Gore*, 253 U.S. 245 (1920), should be overruled. There, the Court held invalid a generally applicable, non-discriminatory income tax as applied to an Article III judge who was appointed to the bench before the tax was enacted. Putting *Evans* v. *Gore* aside, there has never been any question that imposition of a *discriminatory* tax on sitting federal judges violates the Compensation Clause. *O'Malley* v. *Woodrough*, 307 U.S. 277, 282 (1939). The power to impose discriminatory taxes on judicial salaries poses the same threat to judicial independence as the power to impose an outright reduction in salary. Thus, not even the government seriously disputes that a discriminatory tax imposed solely on federal judges would be invalid.

The Social Security Amendments of 1983 imposed precisely the sort of discriminatory tax on federal judges that the Compensation Clause forbids. For the first time, Congress required federal employees to pay Social Security taxes. But Congress exempted almost all incumbent employees from paying any portion of the 5.7% OASDI tax, and provided newly hired employees with offsets that left them paying the same amount in taxes that they would have paid had the amendments never taken effect. Only sitting federal judges were required to pay the OASDI tax without any adjustment allowing them to offset the economic impact of Social Security withholding. As a result, federal judges alone were forced to pay 5.7% more of their salaries in taxes than before the amendments took effect. No other group of American taxpayers was forced to bear this added tax burden. The Compensation Clause bars Congress from diminishing the compensation of sitting judges in this selective fashion.

ARGUMENT

CONGRESS VIOLATED THE COMPENSATION CLAUSE WHEN IT IMPOSED A NEW SOCIAL SECURITY TAX THAT ADVERSELY AFFECTED ONLY SITTING FEDERAL JUDGES.

In *Evans* v. *Gore*, 253 U.S. 245 (1920), this Court held that the Compensation Clause bars Congress from imposing an income tax on the salary of a federal judge who was appointed to the bench prior to the enactment of the tax. As the Federal Circuit recognized, that holding controls the outcome of this case, because respondents were appointed to the bench before Congress first imposed Social Security taxes on their salaries. Not surprisingly, the government argues at length that *Evans* should be overruled, contending that the soundness of the Court's reasoning in that case has been called into question by subsequent decisions. U.S. Br. 17-28.

The government's arguments for overruling *Evans* are not persuasive. The Court's core holding – that Congress may not indirectly diminish the compensation of a sitting federal judge by imposing a new tax on the judge's salary – is as sound today as it was 80 years ago. However, the Court need not decide here whether *Evans* has "withstood . . . the test of time," U.S. Br. 28, because this case can be resolved on a narrower ground whose legal principles are not in dispute. The government itself "assumes" that a discriminatory tax imposed solely on federal judges would "contravene fundamental principles underlying Article III, if not the [Compensation] Clause itself." *Id.* at 37 n.27. The Social Security amendments at issue here are invalid because they discriminated against sitting federal judges. Those judges alone were singled out for a tax increase that did not adversely affect any other group of American taxpayers. Such a tax plainly violates the Compensation Clause.

I. CONGRESS MAY NOT DIMINISH THE COMPENSATION OF SITTING FEDERAL JUDGES BY IMPOSING DISCRIMINATORY TAXES ON THEIR SALARIES.

Article III, section 1, provides:

> The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

The purpose of this provision is manifest: to assure the independence of the Judiciary as a separate and co-equal branch of government. *United States* v. *Will*, 449 U.S. 200, 218 (1980). The Framers recognized that protecting judges' tenure in office was a necessary but not a sufficient condition to secure such independence. As Alexander Hamilton eloquently observed:

> In the general course of human nature, a power over a man's subsistence amounts to a power over his will. And we can never hope to see realized in practice the complete separation of the judicial from the legislative power, in any system which leaves the former dependent for pecuniary resources on the occasional grants of the latter."

The Federalist No. 79, at 472 (Clinton Rossiter ed., 1961) (emphasis omitted). The Compensation Clause embodies the common-sense determination that the power to deprive judges of their means of financial support would be just as potent a threat to judicial independence as the power to remove judges from office at will.

The Framers chose their words carefully when specifying the protection from financial attack that they intended to confer upon Article III judges. The Framers declared that a

judge's "[c]ompensation" shall not be "diminished" during the judge's term in office. The Framers did not provide, as the government suggests, that a judge's *salary* shall not be *reduced*. Indeed, Hamilton noted that the Framers had rejected the phrasing used by a number of contemporary state constitutions, which provided that judges would be afforded "permanent salaries," because experience had shown that such a formulation was "not sufficiently definite to preclude legislative evasions." *Id.* The Court merely followed the Framers' intent when it held in *Evans* that the Compensation Clause bars both direct reductions of a judge's salary, as well as indirect diminution of a judge's compensation through more evasive means, such as taxation. 253 U.S. at 254-55.

A reading of the Compensation Clause that would prohibit Congress from cutting judicial salaries by 20%, but permit it to achieve the same end by imposing a 20% tax on those salaries, would negate the very purpose of the Clause. Indeed, under that reading of the Clause, nothing would prevent Congress from imposing a 90% income tax on judges in an attempt to render them destitute. Of course, Congress would be unlikely to impose a 90% income tax on all taxpayers in order to punish judges. But so long as Congress is permitted to impose special taxes that affect judges alone, it is free to engage in financial attacks on judicial independence without fear of political backlash. Given their small numbers, federal judges can hardly rely upon the "political constraints" that may keep Congress from imposing unduly burdensome taxes on the general public. See U.S. Br. 34 n.24. Thus, even in upholding an income tax imposed on judges who were appointed *after* the tax was enacted, the Court has emphasized that such a tax is valid only to the extent that it is nondiscriminatory and laid generally on all employees. See *O'Malley* v. *Woodrough*, 307 U.S. 277, 282 (1939).

The imposition of taxes that adversely affect judges alone poses obvious threats to the Judiciary's independence and the

core values embodied in the Compensation Clause. Thus, even the government does not dispute that discriminatory taxation of judges results in a "diminution" of their compensation within the meaning of the Clause. U.S. Br. 37 n.27.[4] Yet, as explained below, the 1983 Social Security Amendments involved precisely the sort of discriminatory taxation of judges that even the narrowest reading of the Compensation Clause condemns.

II. THE 1983 SOCIAL SECURITY AMENDMENTS DISCRIMINATED AGAINST SITTING FEDERAL JUDGES BY IMPOSING AN ADVERSE FINANCIAL IMPACT ON THEM ALONE.

As alluded to earlier, when Congress first imposed Social Security taxes, it exempted nearly all federal employees, including all federal judges, from payment of those taxes. Pet. App. 55a. Most federal employees, however, were not afforded retirement benefits free of charge; they were required to pay a tax on their salaries to fund the CSRS. *Id.*

Judges alone were exempted from the payment of any income tax to pay for retirement benefits; instead of participating in the CSRS, they were eligible to receive a lifetime annuity payable from general tax revenues. See 28 U.S.C. § 371. Thus, as of December 31, 1983, Congress had extended a unique tax exemption to all Article III judges. They were subject to neither the 7% withholding required of most federal employees, J.A. 112, nor the 5.7% OASDI tax

---

[4] Of course, that concession undermines the government's principal argument, which is that a generally applicable, non-discriminatory tax does not effect a "diminution" within the meaning of the Clause at all. *See* U.S. Br. 29. A tax either does or does not diminish a judge's compensation; whether the tax also happens to diminish the compensation of others who are not protected by the Clause is wholly irrelevant to that determination.

imposed on nearly all private-sector employees, J.A. 47. See Pet. App. 14a.

When it enacted the 1983 Social Security Amendments, however, Congress stripped judges of this exemption by imposing a new 5.7% income tax that had no adverse impact on the compensation of any other group of federal employees. The vast majority of incumbent federal employees paid no portion of the 5.7% OASDI tax at all; they simply continued to have 7% of their salaries withheld under the CSRS, and thus suffered no impact from the amendments, adverse or otherwise. Newly hired federal employees were subject to the 5.7% tax, but their contributions to the CSRS were reduced to 1.3%, leaving them paying the same 7% of their salaries that they would have paid had the amendments never taken effect. With one exception, the small group of incumbent federal employees who were forced to pay the 5.7% OASDI tax were given options to insure that they would not have to pay more in taxes than they had prior to January 1, 1984. The one exception, of course, was sitting federal judges, who alone among federal employees were forced to pay 5.7% more of their salaries in taxes than they had been required to before January 1, 1984.

The effect of the 1983 Social Security Amendments would have been no different had Congress simply passed a special 5.7% surtax on the salaries of all federal judges while leaving the tax burden of the remainder of the population unchanged. Thus, contrary to the government's suggestion, judges were left without *any* "protection in the political system against excessively burdensome income taxes." U.S. Br. 36. They could not hope to band together with like-minded fellow citizens to protest a new and unwanted tax burden, for no other citizens were affected and thus none had reason to be concerned. The form of discriminatory taxation imposed here, if left unchecked, would allow Congress to exert the

very control over judges' "subsistence" that the Framers sought to prevent.

In defense of the 1983 Amendments, the government makes two related points that are readily dismissed. First, the government asserts that no Compensation Clause violation occurred here because Congress merely "equalized" the tax treatment of federal judges and the rest of the general workforce. *Id.* at 39-40. What the government acknowledges but then quickly overlooks, however, is the fact that, prior to January 1, 1984, Congress had extended to judges alone a special exemption that no other group enjoyed. Eliminating that exemption to "equalize" the tax treatment of judges and the general population necessarily disadvantaged judges to the exclusion of anyone else. See Pet. App. 50a. The Compensation Clause does not permit Congress to diminish the compensation of sitting judges in this selective fashion.

Second, the government argues that, at most, respondents quibble over the fact that Congress achieved in two steps what it could have accomplished in one. U.S. Br. 34. That is to say, under the government's reading of the Compensation Clause, Congress could have imposed the OASDI tax on judges when it first imposed the tax on the general public. In the government's view, then, the fact that Congress delayed imposition of the tax on judges until taking the second step in 1983 is of no constitutional concern.

This assertion is flatly inconsistent with the core purpose of the Compensation Clause, as a simple hypothetical illustrates. Assume that when Congress first enacted the income tax, it subjected the general public to a 30% tax rate, but imposed a special rate of only 15% on federal judges. Suppose further that, some time later, displeased with decisions rendered by the courts, Congress announced that henceforth all federal judges would be subject to the same 30% tax rate applicable to other taxpayers. A discriminatory doubling of the income

tax rates applicable to judges alone would unquestionably violate the Compensation Clause for the reasons noted above. Such a conclusion merely acknowledges that, absent the protection of the Clause, Congress could use the discriminatory withdrawal of tax benefits to threaten judicial independence in the same manner that it could use discriminatory tax assessments to bend the Judiciary to its will.

The 1983 Social Security Amendments at issue here are no different in effect from the hypothetical just described. Congress may have sought to achieve parity in the way judges and the rest of the workforce were treated with respect to payment of the OASDI tax, but in doing so it singled out sitting judges for a new financial burden that no other group of taxpayers had to endure. Treating judges in this fashion poses the same potential threat to judicial independence as imposition of an outright pay cut. The Framers deliberately removed from Congress the power to diminish judicial compensation – for whatever purpose – by formulating a bright-line standard that allows no exceptions. See *Evans*, 253 U.S. at 255. The line chosen by the Framers should be adhered to in this case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

RICHARD WALCH
LOS ANGELES COUNTY BAR ASSOCIATION
261 S. Figueroa St., Suite 300
Los Angeles, CA 90012
(213) 627-2727

MARK E. HADDAD*
CATHERINE V. BARRAD
PAUL J. WATFORD
SIDLEY & AUSTIN
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

Counsel for the Amici Curiae

January 5, 2001

* Counsel of Record